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NO. 80-1714

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOSEPH S. HOPPER, Commissioner, Alabama Department of Corrections, and
JAMES D. WHITE, Warden, Holman Prison,

PETITIONERS

v.

JOHN LOUIS EVANS,

RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Does *Beck v. Alabama*, 447 U.S. 625 (1980), require the reversal of all Alabama pre-*Beck* capital convictions, including those in which there was absolutely no evidentiary basis for a lesser included offense instruction and in which the defendants admitted, confessed, and pleaded guilty to the capital offense?

2. In a federal habeas corpus proceeding may harm and prejudice be presumed, or must they be alleged and proven by the habeas petitioner?

3. Is a guilty plea limited in effect to being a waiver of defects in proceedings occurring prior to the plea, or does a guilty plea also conclusively establish factual guilt and render irrelevant any constitutional violations which do not stand in the way of conviction if factual guilt is established?

4. May a federal court properly refuse to certify state law questions otherwise within the rule of *Bellotti v. Baird*, 428 U.S. 132 (1976), on the sole ground that preemptive decision of the affected federal constitutional issues moots the state law questions?

PARTIES

The caption contains the names of all parties to the proceeding in the court below.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES i

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

The Facts Concerning the Crime 3

The State Trial Court Proceedings 4

The State Appellate Court Proceedings 7

The Federal District Court Proceedings 7

The Federal Appellate Court Proceedings 10

SUMMARY OF ARGUMENT 11

ARGUMENT 14

I. THE DECISION IN *BECK V. ALABAMA*, 447 U.S. 625 (1980), DOES NOT FORECLOSE CONSIDERATION OF THE VALIDITY OF EVANS' CONVICTION AND SENTENCE 14

A. The Court Below Interpreted the *Beck* Decision to Mandate the Reversal of All Pre-*Beck* Capital Convictions 16

B. The Court Below's Interpretation of the *Beck* Decision Is Wrong 17

II. EVANS' CONVICTION SHOULD NOT HAVE BEEN SET ASIDE BECAUSE HE WAS NOT HARMED OR PREJUDICED IN ANY WAY BY THE EXISTENCE OF THE PRECLUSION CLAUSE 22

A. The Existence of the Preclusion Clause Did Not Harm or Prejudice Evans in Any Way 22

1. No Lesser Offense Instructions Would Have Been Given Anyway Because There Was No Evidence to Support Them 22

2. Evans' Course of Conduct Was Not Affected by the Preclusion Clause Which Did Not Prevent or Discourage Him from Presenting Any Lesser Offense Evidence 25

B. Since Evans Was Not Harmed or Prejudiced by the Preclusion Clause, His Conviction Should Not Have Been Set Aside 30

1. Prejudice is an Essential, Component of a Due Process Fundamental Fairness Claim 30

2. Even Where There is a Constitutional Violation a Conviction Should Not Be Set Aside Absent Harm 33

3. Proof of Harm and Prejudice is Especially Important in Habeas Corpus Proceedings 35

III. EVANS' CONVICTION SHOULD NOT HAVE BEEN SET ASIDE BECAUSE HIS GUILTY PLEA WAIVED THE PRECLUSION CLAUSE ISSUE AND RENDERED THE CLAUSE CONSTITUTIONALLY IRRELEVANT 36

A. Evans' Guilty Plea Was Accepted and Under Alabama Law a Guilty Plea Does Have Effect 36

B. Evans' Guilty Plea Waived the Preclusion Clause Issue and Rendered the Clause Constitutionally Irrelevant 40

IV. THE COURT BELOW ERRED IN REFUSING TO CERTIFY THE STATE LAW QUESTIONS INVOLVED IN THIS CASE TO THE ALABAMA SUPREME COURT 42

A. This Case Involves Important State Law Questions Which Should Have Been Certified to the Alabama Supreme Court Before the Federal Issues Were Answered 42

B. The Rule Adopted By the Court Below Stands the Law of Certification on its Head 44

C. This Court Itself Should Certify the State Law Questions to the Alabama Supreme Court 46

CONCLUSION 47

APPENDICES 1a

A. *Ritter v. State*, No. 77-798 (Ala. June 12, 1981) (on rehearing) 1a

B. *Ritter v. State*, No. 77-798
(Ala. May 8, 1981) 10a

TABLE OF AUTHORITIES

Cases	Page
Alabama v. King & Boozer, 314 U.S. 1 (1941)	44
Andrews v. Louisville & Nashville R.R. Co., 406 U.S. 320 (1972)	17
Avery v. Maremont, 628 F. 2d 441 (5th Cir. 1980)	39
Barnes v. Atlantic & Pacific Life Ins. Co. 530 F. 2d 98 (5th Cir. 1976)	45-46
Beck v. Alabama, 447 U.S. 625 (1980)	***passim***
Beck v. State, 396 So. 2d 645 (Ala. 1981) (on remand)	23, 33-34, 40 43, 45
Beck v. Washington, 369 U.S. 541 (1962)	17, 30-31, 33
Bellotti v. Baird, 428 U.S. 132 (1976)	i, 14, 42-43, 46
Blackledge v. Allison, 431 U.S. 63 (1977)	35-36
Blackledge v. Perry, 417 U.S. 21 (1974)	39
Boehning v. Indiana Employees Ass'n., 423 U.S. 6 (1975)	42
Boykin v. Alabama, 395 U.S. 238 (1969)	37
Brady v. Maryland, 373 U.S. 83 (1963)	33
Brady v. United States, 397 U.S. 742 (1970)	37-41
Brickhouse v. Zahradnick, 553 F. 2d 340 (4th Cir.), *cert. denied*, 434 U.S. 938 (1977)	40

Chapman v. California, 386 U.S. 18 (1967) 34-35

Cupp v. Naughton, 414 U.S. 141 (1973) 31

Cuyler v. Sullivan, 446 U.S. 335 (1980) 32

Davis v. Alaska, 415 U.S. 308 (1974) 32

Donnelly v. De Christoforo, 416 U.S. 637 (1974) 30-32

Dresner v. Tallahassee, 375 U.S. 136 (1963) 46

Elkins v. Moreno, 435 U.S. 647 (1978) 46

Evans v. State, 361 So. 2d 654 (Ala. Cr. App. 1977), *aff'd*, 361 So. 2d 666 (Ala. 1978), *cert. denied*, 440 U.S. 930 (1979) 2, 6-7, 26, 36

Evans (Betty) v. Bonnett, 467 F. Supp. 1108 (S.D. Ala. 1979), *temporary stay granted*, 440 U.S. 1301 (1979), (Rehnquist, J., as Circuit Justice), *stay denied*, 440 U.S. 987 (1979) (misc. order) 8, 26

Ex Parte Sankey, 364 So. 2d 362 (Ala. 1978), *cert. denied*, 440 U.S. 964 (1979) 38

Fulgham v. State, 291 Ala. 71, 277 So. 2d 886 (1973) 22

Furman v. Georgia, 408 U.S. 238 (1972) 33

Graham v. State, No. 4 Div. 787 (Ala. Cr. App. 1980), *writ quashed as improvidently granted*, No. 79-586 (Ala. 1981) 38

Gray v. State, 394 So. 2d 92 (Ala. Cr. App.), *cert. denied* 399 So. 2d 840 (Ala. 1981) 22-23

Gregg v. Georgia, 428 U.S. 153 (1976) 18

Harris v. State, 398 So. 2d 777 (Ala. Cr. App.), *cert. denied*, 398 So. 2d 780 (Ala. 1981) 22

Haynes v. United States, 390 U.S. 85 (1968) 39

Henderson v. Kibbe, 431 U.S. 145 (1977) 31, 35

Ingraham v. Wright, 430 U.S. 651 (1977) 30

Kusper v. Pontikes, 414 U.S. 51 (1973) 46

Lake Carriers' Ass'n. v. MacMullen, 406 U.S. 498 (1972) 42

Lefkowitz v. Newsome, 420 U.S. 283 (1975) 38

Lehman Bros. v. Schein, 416 U.S. 386 (1974) 46

Lockett v. Blackburn, 571 F. 2d 309 (5th Cir.), *cert. denied*, 439 U.S. 873 (1978) 35

Massachusetts v. Feeney, 429 U.S. 66 (1976) 46

McCarthy v. United States, 394 U.S. 459 (1969) 41

McMann v. Richardson, 397 U.S. 759 (1970) 40-41

Menna v. New York, 423 U.S. 61 (1975) 41

North Carolina v. Alford, 400 U.S. 25 (1970) 38

Prothro v. State, 370 So. 2d 740 (Ala. Cr. App. 1979) 37-38

Ritter v. State, 361 So. 2d 654 (Ala. Cr. App. 1977), *remanded*, 361 So. 2d 666 (Ala.), *aff'd on remand*, 375 So. 2d 266 (Ala. Cr. App. 1978), *aff'd*, 375 So. 2d 270 (Ala. 1979), *vacated and remanded*, 448 U.S. 903 (1980), *rev'd on remand*, No. 77-798 (Ala. May 8, 1981), *extended on rehearing*, (Ala. June 12, 1981), *certiorari pending*, No. 81-247 (U.S. filed Aug. 6, 1981) ..... ***passim***

Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976) 18-19

Rose v. Mitchell, 443 U.S. 545 (1979) 32, 35

Sansome v. United States, 380 U.S. 343 (1965) 18

Sumner v. Mata, 101 S. Ct. 764 (1981) 26-27

Swain v. Alabama, 380 U.S. 202 (1965) 35

Tollett v. Henderson, 411 U.S. 258 (1973) 40-41

Tyler v. Insurance Co. of North America, 520 F. 2d 341 (5th Cir. 1975) 45

United States v. Agurs, 427 U.S. 97 (1976) 31-32

United States v. Blue, 384 U.S. 251 (1966) 33

United States v. Jackson,
390 U.S. 570 (1968) 37, 40

United States v. Lovasco,
431 U.S. 783 (1977) 31

United States v. Marion, 404
U.S. 307 (1971) 31

United States v. Morrison,
101 S. Ct. 665 (1981) 33

Walker v. Johnston, 312 U.S.
275 (1941) 35

Witherspoon v. Illinois,
391 U.S. 510 (1968) 32

Zenith Radio Corp. v.
United States, 437 U.S.
443 (1978) 20-21

Constitutional Provisions

United States Constitution, Fifth Amendment 33

United States Constitution, Sixth Amendment 32

United States Constitution, Eighth Amendment 8

United States Constitution, Fourteenth
Amendment, Due Process Clause ..... ***passim***

United States Constitution, Fourteenth
Amendment, Equal Protection Clause 8, 32

Alabama Constitution of 1901, Article VI,
§140(b)(3), as amended by Amendment
No. 328 45

Statutory Provisions

28 U.S.C. §1254(1) 2

28 U.S.C. §2101(c) 2

28 U.S.C. §2253 10
28 U.S.C. §2254 ..... 2, 3, 8
Code of Alabama 1975, § 13-1-70 29
Code of Alabama 1975, § 13-1-73 23
Code of Alabama 1975, § 13-1-74 29
Code of Alabama 1975, § 13-3-110 29
Code of Alabama 1975, § 13-11-2(a)(2) 5, 28-29
Code of Alabama 1975, § 13-11-5 7
Code of Alabama 1975, § 12-22-150 7
1981 Alabama Acts, No. 81-178 37

Other Authorities

Alabama Rules of Appellate Procedure 18 ..... 3, 45
Do Judges Make Death Penalty an Empty Threat, U. S. News & World Report, May 11, 1981, at 72 27

NO. 80-1714

IN THE

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OCTOBER TERM, 1981

JOSEPH S. HOPPER, et al.,

Petitioners

v.

JOHN LOUIS EVANS,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

1. The opinion of the United States District Court for the Southern District of Alabama, denying Respondent Evans' petition for a writ of habeas corpus is reported as *Evans v. Birtton*,[1] 472 F. Supp. 707 (S.D. Ala. 1979), and is contained in the Certiorari Petition Appendix at pp. 46a -128a.

[1]The caption of the district court opinion misspells the name of Robert G. Britton, then Commissioner of the Alabama Department of Corrections. (R. 54, 76)

2. The opinion of the United States Court of Appeals for the Fifth Circuit, reversing the district court's denial of the habeas petition, with one judge dissenting, is reported as *Evans v. Britton*, 628 F. 2d 400 (5th Cir. 1980), and is contained in the Certiorari Petition Appendix at pp. 15a -22a.

3. The extension of the opinion of the United States Court of Appeals for the Fifth Circuit, in denying rehearing with one judge dissenting, is reported as *Evans v. Britton*,[2] 639 F. 2d 221 (5th Cir. 1981) (on rehearing), and is contained in the Certiorari Petition Appendix at 3a - 14a.[3]

JURISDICTION

The jurisdiction of this Court is based on 28 U.S.C. §§ 1254(1) and 2101(c), and Rule 20.4, the court below having reversed the district court's decision in a civil proceeding brought under 28 U.S.C. §2254, and having denied rehearing on March 9, 1981 (A. 2; Pet. App. 3a - 14a).[4]

The judgment of the court below has been stayed since March 12, 1981 (A. 2), and this Court granted a writ of certiorari on June 22, 1981 (A. 74).

CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution, which provides:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

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[2]Since the certiorari petition was granted on June 22, 1981, the name of this case has been changed pursuant to the automatic substitution provision of Rule 40.3.

[3]The state appellate court opinions affirming Evans' conviction and sentence are reported as *Evans v. State*, 361 So. 2d 654 (Ala. Cr. App. 1977), *aff'd*, 361 So. 2d 666 (Ala. 1978), *cert. denied*, 440 U.S. 930 (1979).

[4]References to "A." are to the joint appendix. References to "Pet. App." are to the appendix to the certiorari petition.

2. 28 U.S.C. §2254, which is reproduced in the Certiorari Petition Appendix at 129a - 134a.

3. Alabama Rule of Appellate Procedure 18, which is reproduced in the Certiorari Petition Appendix at 30a-33a.

STATEMENT OF THE CASE

The Facts Concerning the Crime

In September of 1976, respondent Evans was released on parole from an Indiana prison. (A. 8; Tr. 231-232, 238, 321)[5] Before being released, Evans had made plans with an inmate named Wayne Eugene Ritter to go on a cross-country crime spree when they got out. (A. 8-9) After leaving Indianapolis on Christmas Day, 1976, Evans and Ritter committed armed robberies in three different states. (A. 9) They then went to Mobile, Alabama to commit another robbery. (A. 10, 39)

On January 5, 1977, in Mobile, Evans and Ritter robbed a pawn shop where Edward A. Nassar was employed. (A. 10-12, 38-40) During the robbery, Evans murdered Nassar by shooting him in the back while Nassar's seven- and nine-year-old daughters watched. (A. 6, 10-13, 38-41; Tr. 142-145) Nassar was not the first man Evans had killed (A. 21) Evans fully understood the consequences of his acts in shooting Nassar (A. 19), and Evans felt no remorse over it. (A. 42)

In the two months after the robbery and murder of Nassar, Evans and Ritter committed numerous violent crimes, including kidnappings with extortion and more than a dozen robberies, in seven different states. (A. 12-15; Tr. 288-292) At one point during the crime spree, Evans telephoned an F.B.I. agent about turning himself in. (A. 20-22) Evans told the agent that "[i]f they still have the death penalty, then, you know, maybe I'll do it," but that if he could not get the death penalty then he would not turn

[5]References to "R." are to the record on appeal. References to "Tr." are to the two-volume state trial court transcript which was Exhibit A to the habeas answer in district court and is part of the record on appeal. (A. 1, 4; R. 65)

himself in. (A. 22) Because the agent could not guarantee Evans anything, he did not turn himself in. (A. 22; Tr. 336)

On March 7, 1977, Evans and Ritter were finally captured in Little Rock, Arkansas by F.B.I. agents. (Tr. 156-158, 163, 166) The pistol with which Nassar had been murdered was found in Evans' motel room (Tr. 142-145, 157-158, 161-162, 198-200), and a pistol which had been stolen from the pawn shop during the robbery was recovered in the automobile in which Ritter was apprehended. (Tr. 159-162, 220-221)

On March 8, 1977, two F.B.I. agents questioned Evans in Little Rock. (Tr. 167) After being advised of and waiving his *Miranda* rights, Evans signed a written statement in which he freely confessed his involvement in the robbery and murder of Nassar. (A. 6-7; Tr. 170-174, 273-274) Evans also signed written statements confessing his involvement in numerous other crimes in other states. (Tr. 170)

Evans waived extradition and was transported to Mobile where on March 11, 1977, after being advised of his *Miranda* rights by members of the Mobile Police Department, he voluntarily confessed to the robbery and murder of Nassar and to numerous other crimes. (Tr. 288-292, 331) Evans told the Mobile police officers that he wanted to be sentenced to death at the earliest possible date. (Tr. 291)

After his return to the state, Alabama authorities received warrants from four other states charging Evans with numerous crimes of burglary, armed robbery, and kidnapping. (Tr. 233-234, 348-370) Those states and others indicated a desire to prosecute Evans if he was not executed by Alabama. (Tr. 233-234)

The State Trial Court Proceedings

On April 4, 1977, Evans voluntarily appeared before the Mobile County Grand Jury and, against the advice of his attorneys, freely testified at length about the robbery and murder of Nassar. (A. 8-23; Tr. 3, 230-233, 318-337) Evans told the grand jury that he fully understood the consequences of his action in shooting Nassar, that Nassar was not the first man he had killed, and that he would not hesitate to kill again. (A. 12, 19, 21) Evans testified that if

he was ever freed he would go back to robbery, which he described as the easiest way he knew of to make money. (A. 18, 21)

Evans also told the grand jury that he wanted to be indicted as soon as possible, that he intended to plead guilty, and that he preferred execution to life in prison. (A. 17, 22) Evans said that even before he was captured, "I figured that I would get the electric chair anyway, you know, some place." (A. 20)

On April 8, 1977, the Mobile County Grand Jury indicted Evans for the crime of robbery during which the course of which the victim is murdered (Tr. 1), which is a capital offense under *Code of Alabama* 1975, §13-11-2(a)(2).

At arraignment on April 18, 1977, against the advice of his attorneys, Evans pleaded guilty. (A. 24-25; Tr. 67-71) The trial court judge entered the guilty plea in the official minutes of the court. (A. 26) Notwithstanding that plea, the case was submitted to a jury for the reasons discussed on pp. 37 - 39, *infra*.

Although stating that Evans "appears to me to be sane," the judge granted a motion which Evans' attorneys had previously filed to have him examined by a psychiatrist. (Tr. 2, 64, 69) After examining Evans, the appointed psychiatrist reported to the court that Evans was competent, rational, and able to stand trial. (A. 27-28; Tr. 94-95) The psychiatrist further reported that Evans understood thoroughly the nature and results of his actions, knew the difference between right and wrong, and often chose wrong. (A. 27) He also concluded that Evans sincerely preferred execution to a long prison sentence. (A. 28)

Evans and Ritter were jointly tried before a Mobile County jury on April 26, 1977. (Tr. 8, 72-228) Prior to the beginning of the trial, while the judge was qualifying the potential jurors, Evans asked the judge to make sure that none of the jurors had any hesitancy about returning a verdict of death by electrocution. (A. 29-30)

The State's evidence at trial included two eyewitnesses who positively identified Evans, expert testimony matching the death bullet to Evans' pistol, and Evans' confession to the F.B.I. (Tr. 100-101, 131-133, 142-162, 182-183, 198-

200, 277-278)[6]

After the State rested, Evans filed a written "Notice to Enter Guilty Plea," which he had signed acknowledging and waiving his constitutional right not to plead guilty. (A. 33-37) Evans' written guilty plea was accepted by the court and admitted into evidence. (A. 33-37; Tr. 252)

Thereafter, Evans took the stand and testified against himself. (A. 38-42) As his own direct examination, Evans told the jury:

> MR. EVANS: My name is John Louis Evans, and on January the 5th, I was involved in the crime of Eddie Nassar. I am also the one that did pull the trigger and shoot and kill him during the commission of a felony, a robbery. Our whole trip was based on robbery. Kind of a spree. It was well planned, and I've been in crime a long time. Before you go back in there, the only thing I've got to say to the Jury is that I've been at it a long time, and if you don't come back with a death sentence, which is the only other thing I think you can come out with, I'm going to get out, and I'm going to do it again. There's not any question whatsoever. I have no intention whatsoever of ever reforming in any way, so I think you should do what you have to do, and I would rather die by electrocution than to spend the rest of my life in the penitentiary. So, I'm asking very sincerely that you come back with a positive verdict for the State. That's all I have to say. (A. 38)

On cross-examination, Evans testified that he had shot Nassar in the back, and that he did not feel any remorse about it: "Not at all". (A. 41-42) Evans also acknowledged that his attorneys had advised 20 to 30 times not to pursue the course of action he was pursuing at trial. (A. 42)

After Evans testified, his co-defendant Ritter took the

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[6]The State's evidence is detailed in *Evans v. State*, 361 So. 2d 654, 656-661 (Ala. Cr. App. 1977), *aff'd*, 361 So. 2d 666 (Ala. 1978), *cert. denied*, 440 U.S. 930 (1979).

stand. (Tr. 216-221) In his testimony, Ritter confessed his part in the crime and implicated Evans. (Tr. 218-221)

The jury took fewer than fifteen minutes to convict Evans of the capital offense. (Tr. 226-227) Following a sentence hearing held on April 27, 1977, the trial court judge entered written findings concerning aggravating and mitigating circumstances in the case, found that "the aggravating circumstances far outweigh the mitigating circumstances," and sentenced Evans to death for that reason. (Tr. 9-15, 229-243)[7]

The State Appellate Court Proceedings

Evans' conviction and sentence were automatically appealed pursuant to *Code of Alabama* 1975, §§12-22-150 and 13-11-5, and were affirmed by the Alabama Court of Criminal Appeals in *Evans v. State*, 361 So. 2d 654 (Ala. Cr. App. 1977). The Alabama Supreme Court affirmed in *Evans v. State*, 361 So. 2d 666 (Ala. 1978), and this Court denied certiorari in *Evans v. Alabama*, 440 U.S. 930 (1979).[8]

The Federal District Court Proceedings

On April 12, 1979, Evans filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Alabama, which had jurisdiction pur-

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[7]Ritter was also convicted of the capital offense (Tr. 29, 227) and sentenced to death. (Tr. 30-35)

[8]The capital conviction and death sentence of co-defendant Ritter were also initially affirmed in *Evans and Ritter v. State*, 361 So. 2d 654 (Ala. Cr. App. 1977), *remanded*, 361 So. 2d 666 (Ala. 1978), *aff'd on remand*, 375 So. 2d 266 (Ala. Cr. App. 1978), *aff'd*, 375 So. 2d 270 (Ala. 1979), *vacated and remanded*, 448 U.S. 903 (1980), but were reversed in *Ritter v. State*, No. 77-798 (Ala. May 8, 1981) (on remand), *extended on rehearing, id.*, (Ala. June 12, 1981), *certiorari pending*, No. 81-247 (filed August 6, 1981).

The Alabama Supreme Court's as yet unpublished opinions in the *Ritter* case on remand from this Court are reproduced as Appendices A and B to this brief, pp. 1a - 15a, *infra*.

suant to 28 U.S.C. §2254. (A. 48-51; R. 1-6)[9] The petition, as amended, averred that Evans' conviction and sentence were obtained in violation of his Eighth and Fourteenth Amendment rights. (A. 49-50, 57)

The amended petition averred that Evans was convicted and sentenced under a statute which, *inter alia*, precluded consideration of lesser included offenses supported by the evidence, and that preclusion of evidentially supported lesser included offenses violates the due process and equal protection clauses and contributes to a "net result" under Alabama's statute of unreliable sentencing in violation of the Eighth Amendment. (A. 49-50, 57) However, the amended petition did *not* aver that there was any evidence at Evans' trial that would have supported consideration of any lesser included offense verdict, but instead admitted that Evans "testified at trial, admitted guilt and asked to be executed." (A. 48) The amended petition did *not* aver that had the preclusion clause not existed Evans would have presented some evidence to support a lesser included offense theory, nor did it aver that the preclusion clause or any other provision of the statute affected Evans' trial strategy in any way whatsoever. No averments that the preclusion clause harmed or prejudiced Evans were made. (R. 1-8, 52-53)

The amended petition also attacked the sentencing provisions of the statute under which Evans was convicted, characterizing the jury verdict as a "mandatory jury-fixed death sentence," which violated the Eighth and Fourteenth Amendments. (A. 49-50; R. 52) However, the amended petition acknowledged that Evans had asked to be executed (A.

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[9]After certiorari was denied, a next-friend habeas petition and application for stay was filed by Evans' mother. That proceeding is reported as *Evans (Betty) v. Bennett*, 467 F. Supp. 1108 (S.D. Ala. 1979), *temporary stay granted*, 440 U.S. 1301 (1979) (Rehnquist, J., as Circuit Justice), *stay denied*, 440 U.S. 987 (1979) (misc. order).

After a temporary stay was granted against his wishes in that next-friend proceeding, Evans decided to contest his conviction and sentence. *Evans (Betty) v. Bennett*, 440 U.S. 987 (1979) (misc. order denying stay) (concurring statement of Brennen, J.). (R. 40-41). The record does not reveal why Evans changed his mind. But see, R. 44-48.

48), and it did not aver that Evans was harmed or prejudiced by the sentencing provisions of the statute or that the sentence Evans received was affected by those provisions. (R. 1-8, 52-53)

The answer filed by petitioners (respondents there) denied that any of Evans' constitutional rights had been violated. (A. 59-66) It averred that Evans, after being fully advised of his rights, had voluntarily confessed his guilt at each stage of the proceedings which led to his conviction and sentence (A. 59), and had asked to be convicted, sentenced to death, and executed. (A. 60) It also averred that Evans had pleaded guilty at arraignment and trial, and that because of his guilty plea review of Evans' conviction and sentence in this proceeding was limited. (A. 59, 65)

A hearing on the petition was held by the district court on May 17, 1979. (A. 4; H.Tr. 1-88)[10] At that hearing, petitioners (respondents there) argued that Evans had not been entitled to have the jury consider any lesser included offense verdict because there was no evidence to support such a verdict. (H.Tr. 75) Evans did not argue to the contrary and although he presented evidence on another issue (H.Tr. 20-31), Evans presented no evidence that he had been harmed by the existence of the preclusion clause, nor did he present any evidence that the preclusion clause had influenced the course of action he pursued at trial. (H.Tr. 1-88) Instead, Evans' sole contentions were that the statute was unconstitutional "on its face" and as "applied statewide." (H.Tr. 34, 43)

On June 12, 1979, the district court entered an order denying Evans' petition (A. 67), and issued an opinion reported as *Evans v. Birtton*,[11] 472 F. Supp. 707 (S.D. Ala. 1979). (Pet. App. 46a-128a) In its opinion, the court found that Evans "had pled guilty, voluntarily and with full knowledge of his *Boykin* rights, on four separate occasions,

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[10]References to "H.Tr." are to the transcript of the hearing on the petition held in the district court, which is part of the record on appeal. (A. 5)

[11]See n. 1 on p. 1, *supra*.

at least once before the jury." 472 F. Supp. at 711 & n. 1, 712 n. 2. (Pet. App. 53a - 54a, 119a - 1.

The Federal Appellate Court Proceedings

Evans appealed to the United States Court of Appeals for the Fifth Circuit, which had jurisdiction pursuant to 28 U.S.C. §2253. After submission of the appeal, this Court issued its opinion in *Beck v. Alabama*, 447 U.S. 625 (1980), holding it unconstitutional to execute a capital defendant whose jury had not been permitted to consider a lesser included non-capital offense verdict when the evidence at trial would have supported such a verdict.

On July 1, 1981, petitioners (appellees below) filed a motion requesting the Fifth Circuit to certify to the Alabama Supreme Court specified questions of Alabama law — some of which were raised in the wake of the *Beck* decision — the answers to which would either avoid in whole or in part the federal constitutional issues or would at least modify those issues. (A. 1) (That motion is reproduced at A. 68 - 71.)

Thereafter, the court below ordered supplemental briefs concerning the effect of the *Beck* decision on Evans' case. Petitioners argued that Evans' case was distinguishable from *Beck* both because there was no evidentiary basis for a lesser included offense verdict at Evans' trial and because Evans had pleaded guilty. Evans, on the other hand, argued that guilty pleas had no effect in capital cases as a matter of Alabama law and that he was entitled to a new trial. Petitioners argued that the state law issues should be certified before the federal constitutional issues were decided, and Evans argued to the contrary.

On October 15, 1980, the Fifth Circuit reversed the district court in a decision reported as *Evans v. Britton*, 628 F. 2d 400 (5th Cir. 1980). (Pet. App. 15a - 22a) In a per curiam opinion, the two-judge majority held that Evans' conviction and sentence must be set aside as a federal constitutional matter and refused to certify the related state law questions to the Alabama Supreme Court. One judge dissented because of the failure to certify at least one of the state law questions. 628 F. 2d at 401-402 (Thomas, J., dis-

senting). (Pet. App. 21a - 22a)

Petitioners then filed a petition for rehearing with a suggestion for rehearing en banc. (A. 2) On March 9, 1981, the Fifth Circuit panel extended its original opinion, *Evans v. Britton*, 639 F. 2d 221 (5th Cir. 1981) (on rehearing) (Pet. App. 3a - 14a), but denied the petition in all other respects. One judge continued to dissent for the reasons he had stated in the initial opinion. 639 F. 2d at 224. (Pet. App. 12a)[12]

The Fifth Circuit's judgment has been stayed since March 20, 1981 (A. 2), and this Court granted certiorari on June 22, 1981. (A. 74)

SUMMARY OF ARGUMENT

Beck v. Alabama, 447 U.S. 625 (1980), held that it was unconstitutional to prevent a capital jury from considering a lesser included offense verdict which is supported by the evidence at trial, but that holding does not foreclose the issues in this case. In *Beck* there was evidence to support lesser offense instructions which would have been given had it not been for the preclusion clause, and the grant of certiorari and holding were carefully limited to those facts. No other issues were presented or argued. The "in every case" language in the *Beck* opinion, 447 U.S. at 642-643, refers to every case within the grant of certiorari and holding — every case in which the evidence at trial would support a lesser offense verdict. Applying the "in every case" language to cases like this one in which there was no evidentiary basis for lesser offense instructions would mean not only that *Beck* sub silentio overruled prior decisions of this Court, but also that it invalidated virtually every capital punishment statute in this country.

Evans' conviction should not have been set aside for three independently adequate reasons. First, since Evans was not prejudiced by the preclusion clause, its mere existence did not violate his constitutional rights. Second, even

[12]Petitioners efforts after the panel denied rehearing to clarify the en banc status of the case in the court below were unsuccessful. (A. 2) See, the Petition at 14 & n. 7, and Pet. App. at 39a - 45a.

assuming that the existence of the clause violated some constitutional right of Evans, his conviction should not have been set aside absent a showing of harm. Third, the guilty plea which Evans voluntarily entered waived any constitutional violation concerning the preclusion clause and rendered it irrelevant.

Evans has never established or even pleaded that he was harmed or prejudiced in any way by the preclusion clause, and the record clearly establishes that he was not. There was no evidentiary basis for a lesser offense verdict at the trial. Not only was there no dispute about any element of the capital offense, but Evans repeatedly admitted, confessed, and bragged about his guilt at every stage of the prosecution, including the trial. Since the jury would not have received any lesser offense instructions if the preclusion clause had not existed, the clause did not operate at all in Evans' case.

Nor did the preclusion clause stop or even discourage Evans from presenting lesser offense evidence. The record shows that the single-minded course of conduct which Evans followed throughout the state court proceedings was caused not by the preclusion clause but rather by his desire for notoriety and his preference for death over a long prison term. Given his determination to be free or die, Evans had everything to gain and nothing to lose by presenting lesser offense evidence while the preclusion clause existed. Because the preclusion clause removed from a lesser offense strategy the possibility of the one thing that Evans feared the most — a long prison term — the existence of the clause actually acted as an incentive for Evans to present lesser offense evidence. Evans chose to pass up that incentive in favor of a headline grabbing, self-destructive course of conduct. He made that choice in spite of the preclusion clause, not because of it.

Under this Court's decisions prejudice must be shown in order to establish a violation of the due process right to fundamental fairness. This Court's decisions also establish that even where a constitutional violation exists a conviction should not be set aside absent a showing of harm. The requirement of harm and prejudice is especially important

in habeas corpus proceedings because the issuance of writs of habeas corpus undercuts finality and inflicts substantial costs on society, on our system of justice, and on our federal fabric. The court of appeals erred in ordering Evans' conviction set aside on the basis of that court's speculation —never even pleaded by Evans — that he might somehow have been harmed by the preclusion clause. That speculation not only has no basis in fact but in the face of the record is wholly incredible. The burden of proving harm and prejudice is on the habeas petitioner, and Evans failed to carry that burden.

An alternative reason why the conviction should not have been set aside is that Evans pleaded guilty at arraignment and during trial. A valid guilty plea conclusively establishes factual guilt for purposes of appeal thereby rendering irrelevant any defect in the factfinding process, and such a plea also waives all non-jurisdictional defects. Because the sole danger of the preclusion clause was that it increased the risk of an erroneous factfinding concerning guilt in certain circumstances, Evans' guilty plea which conclusively established his guilt for purposes of appeal rendered the existence of the preclusion clause constitutionally irrelevant in his case. Because any constitutional claim concerning the preclusion clause is non-jurisdictional in nature, Evans' guilty plea waived such a claim.

The court of appeals' conclusions that Evans' guilty plea was rejected by the state trial court and that a guilty plea in a capital case has no effect under Alabama law are wrong. As the district court explained, the case against Evans was submitted to a jury not because his guilty plea was rejected, but because all capital cases are submitted to a jury in Alabama since only a jury can sentence a defendant to death. Notwithstanding that rule, under Alabama law a guilty plea when combined with a jury verdict of guilt based on additional proof is effective both to conclusively establish for purposes of appeal the factual guilt of a capital defendant and to waive any and all non-jurisdictional defects in the proceedings.

The court of appeals' misinterpretation of Alabama

law concerning guilty pleas in capital cases underscores the error the court committed when it failed to certify that and other state law questions raised in the wake of the *Beck* decision to the Alabama Supreme Court. The court of appeals' holding that certification is not necessary where a court concludes that the federal Constitution requires reversal in any event stands the rule of *Bellotti v. Baird*, 428 U.S. 132 (1976), on its head, and undermines the important values that certification serves. The rule of *Bellotti* is that state law questions should be certified and answered in order to narrow or avoid federal constitutional issues, not the converse. If this Court concludes that the state law issues in this case should be certified to the Alabama Supreme Court before the federal issues are addressed, then this Court should itself certify those questions to that court.

This Court should reverse the court of appeals' judgment ordering that the writ of habeas corpus issue, or in the alternative, before addressing the federal issues this Court should certify the state law questions involved in this case to the Alabama Supreme Court.

ARGUMENT

I.

THE DECISION IN *BECK v. ALABAMA*, 447 U.S. 625 (1980), DOES NOT FORECLOSE CONSIDERATION OF THE VALIDITY OF EVANS' CONVICTION AND SENTENCE

In *Beck v. Alabama*, 447 U.S. 625 (1980), this Court held that it was unconstitutional to impose a sentence of death on a defendant when the evidence at his trial would have supported a lesser included non-capital offense verdict which the jury was not permitted to consider. In the *Beck* case, there was evidence to support a lesser offense instruction and the jury which convicted Beck would have received such an instruction if the statutory preclusion

clause had not operated to prevent it. 447 U.S. at 629-30. Alabama conceded that much, *id.*, at 630 n. 5, and this Court carefully limited its grant of certiorari and holding accordingly. The very first paragraph of the *Beck* opinion expresses that limitation as follows:

> We granted certiorari to decide the following question:
>
> "May a sentence of death constitutionally be imposed after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and *when the evidence would have supported such a verdict*?" 444 U.S. 897
>
> We now hold that the death penalty may not be imposed *under these circumstances.*

447 U.S. at 627 (emphasis added). The limitation of the decision to "these circumstances" in *Beck* is not surprising, because Beck himself did not ask the Court to address any other circumstances and Alabama specifically requested the Court not to do so.[13]

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[13]Beck stated in his brief that, ". . . Alabama's standard for lesser-offense verdicts in non-capital cases, which is all petitioner asserts should apply, limits lesser-offense instructions to cases where there is at least some evidence supporting a lesser-offense verdict," Reply Brief of Petitioner, *Beck v. Alabama*, (U.S. Oct. Term, 1979, No. 78-6621), at 13 n. 11; and he stated at argument that, "We contend that there had to be some evidence, and the state concedes that there was some evidence." Tr. Oral Arg., *Beck v. Alabama*, *supra*, at 9. In its brief, Alabama requested the Court not to decide in *Beck* the fate of any pre-*Beck* capital cases in which there was no evidentiary basis for a lesser offense verdict — and it named Evans' case as an example —because the issues that would be involved in such a case were not presented by the facts in *Beck*, had been excluded by the certiorari order, and had not been briefed. Brief for Respondent, *Beck v. Alabama*, *supra*, at 77-78 & n. 46.

A. The Court Below Interpreted the *Beck* Decision to Mandate the Reversal of All Pre-*Beck* Capital Convictions

In the present case the two-member court of appeals majority, disregarding the careful limitations expressly placed on the *Beck* decision by this Court, held that the decision mandates that all pre-*Beck* Alabama capital convictions be reversed regardless of the circumstances in a particular case. 628 F. 2d at 401 (Pet. App. 17a - 21a); 639 F. 2d at 223-224 (Pet. App. 11a - 12a). It misinterpreted *Beck* as requiring what amounts to a conclusive presumption of harm for all pre-*Beck* Alabama capital cases.

The absolute nature of the presumption of harm rule perceived by the court below is illustrated by that rule's application to this case in which there was not one jot, speck, or iota of evidence to support any lesser included offense instruction. Evans not only admitted and confessed his guilt at every stage of the prosecution, including the trial, but he also even pleaded guilty to the capital offense and asked to be sentenced to death for it. See pp. 4 - 7, *supra*. After Evans had received the capital conviction and death sentence which he had so actively sought and so richly deserved, the court below held that Evans' conviction and sentence must be overturned because of the unconstitutionality of the preclusion clause, a statutory provision which did not even operate in Evans' case. See pp. 22 - 25, *infra*. Moreover, the court held that any contrary decision "has been foreclosed by the Supreme Court." 639 F. 2d at 223 (Pet. App. 11a).

The court below's misinterpretation of the *Beck* decision is based on three words — "in every case" — which appear in the *Beck* opinion on 447 U.S. at 643. By reading those three words and the paragraph in which they appear out of context, the court below erroneously concluded that this Court had held in *Beck* that every defendant who had been tried under the Alabama capital punishment statute had been subjected to unconstitutionally unreliable fact-finding regardless of the particular circumstances in his specific case. 628 F. 2d at 401 (Pet. App. 19a - 21a); 639 at 223-224 (Pet. App. 11a - 12a).

B. The Court Below's Interpretation of the *Beck* Decision is Wrong

This Court has previously held that it is precluded from deciding constitutional issues outside the scope of the question to which a grant of certiorari is specifically limited. *See, e.g., Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320, 324-325 (1972); *Beck v. Washington*, 369 U.S. 541, 554 (1962). Accordingly, this Court limited its decision in *Beck v. Alabama*, 447 U.S. at 627 ("We now hold that the death penalty cannot be imposed *under these circumstances.*" (emphasis added)), to the issue which was framed by the certiorari order that had been tailored to fit the facts of that case. No other issue was argued or decided in *Beck*, a fact the court below ignored in favor of an overly literal reading of three words in the twenty-three page opinion.

The words "in every case," as they appear in the *Beck* opinion on 447 U.S. at 643, mean in every case within the bounds of the grant of certiorari. They mean "in every case" covered by what this Court described as "these circumstances," 447 U.S. at 627 — every case in which there was an evidentiary basis for a lesser included offense instruction which was not given. They mean in Beck's case and in all the many cases like it, but not in the unusual case like the present one in which the defendant not only does not contest his guilt, but also admits, confesses, and brags about it at every stage of the proceeding including the trial itself.

The full paragraph of the *Beck* opinion from which the court below lifted the words "in every case" is as follows:

> In the final analysis the difficulty with the Alabama statute is that it interjects irrelevant considerations into the factfinding process, diverting the jury's attention from the central issue of whether the State has satisfied its burden of proving beyond a reasonable doubt that the defendant is guilty of a capital crime. Thus, on the one hand, *the unavailability of the third option of convicting on a lesser included offense may encourage the jury to convict for an impermissible reason — its belief that the defend-*

> *ant is guilty of some serious crime and should be punished.* On the other hand, *the apparently mandatory nature of the death penalty may encourage it to acquit for an equally impermissible reason — that, whatever his crime, the defendant does not deserve death.* In any particular case *these two extraneous factors* may favor the defendant or the prosecution or they may cancel each other out. But *in every case* they introduce a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case.

447 U.S. at 642-643 (emphasis added; footnote omitted). The two underlined statements, describing the two "extraneous factors" involved, cannot possibly have been intended to apply to literally "every" case tried under Alabama's statute, including the present one.

Take, for example, the first statement or "extraneous factor" referred to: "the unavailability of the third option of convicting on a lesser included offense may encourage the jury to convict for an impermissible reason — its belief that the defendant is guilty of some crime and should be punished." This Court cannot possibly have meant to say that in literally "every case" in which juries are not permitted to consider lesser included offense verdicts there is an intolerable level of uncertainty and a risk of unreliable factfinding, because the rule in virtually every jurisdiction in this country, including the federal courts, is that lesser included offense instructions need not be given when there is absolutely no evidence to support them. *See, e.g., Beck v. Alabama*, 447 U.S. at 634-637 (collecting state cases); *Sansome v. United States*, 380 U.S. 343, 350, 354-355 (1965) (rule in federal court).

The Constitution does not require that a capital jury be instructed on a lesser included non-capital offense which is not supported by the evidence. *See, Gregg v. Georgia*, 428 U.S. 153, 160-163, 215-216 (1976) (upholding Georgia's statute which provides for lesser included offense instructions only when such instructions are supported by a "view of the evidence"); *cf., Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325, 334-335 (1976) (plurality opinion) (criticizing a provi-

sion of Louisiana's mandatory capital statute which required lesser offense instructions not supported by the evidence). If this Court adopts the court below's overly literal interpretation of *Beck*'s "in every case" language, then *Beck* will have invalidated sub silentio virtually every capital punishment statute in this country, because almost all of them provide for lesser offense instructions only when such instructions are supported by the evidence.

Such an absurdly literal interpretation of *Beck*'s "in every case" language is not required, as the passage in question itself reveals. In that passage, this Court explained that the absence of lesser offense verdict options "may encourage the jury to convict for an impermissible reason" when the jury has a "belief that the defendant is guilty of some serious [lesser included] crime and should be punished." *Beck v. Alabama*, 447 U.S. at 642. The only time the jury could rationally reach a "belief that the defendant is guilty of some serious [lesser included] crime," is when there is some rational basis in the evidence for such a belief. Therefore, the only cases in which preclusion of lesser offense verdict options could encourage capital offense convictions based on impermissible reasons are cases in which there is at least some evidentiary basis for a verdict convicting the defendant of a lesser offense instead of the capital offense.

The phrase "in every case" must also be limited insofar as it refers to the second "extraneous factor" set out in the paragraph of the *Beck* opinion in question, which is that: "the apparently mandatory nature of the death penalty may encourage it to acquit for an equally impermissible reason — that, whatever his crime, the defendant does not deserve death." 447 U.S. at 642-643 (footnote omitted). This Court cannot have meant that there was a constitutionally intolerable risk of acquittal in Alabama capital cases tried before the *Beck* decision, because this Court pointed out that there had been a 96% conviction rate in pre-*Beck* capital cases. 447 U.S. at 641 & n. 18. Surely, a 4% acquittal rate is not intolerably high.

What this Court did mean in the paragraph in question is evident from the particular argument that it was written

to answer. Alabama had argued that any effect the preclusion clause might have in influencing a jury to wrongfully convict a defendant of a capital offense when the evidence showed that the defendant was guilty of a serious lesser offense would be offset by the effect of the seemingly mandatory verdict form requirement. The argument was that when there was an evidentiary basis for a lesser offense, the preclusion clause's push toward improper convictions would be offset by the verdict form's pull toward improper acquittals. *Beck v. Alabama*, 447 U.S. at 638-641. This Court rejected that argument, *id.*, at 639-643, but the important point here is that the language of the *Beck* opinon referring to an intolerable risk of erroneous factfinding "in every case" was intended to answer it. Because Alabama had argued that *in every case like Beck's* in which there was an evidentiary basis for a lesser included offense there would be an offsetting of pressures on the jury, this Court in rejecting that argument answered that in every such case — "in every case" like Beck's — there would be uncertain and unreliable factfinding. But in cases like the present one where there was no evidentiary basis for a lesser included offense, there was no pressure on the jury to erroneously convict the defendant of the capital offense in order to prevent his release, because there was no reason for the jury to believe that he was guilty of a serious lesser offense and should not be acquitted for that reason.[14]

The error which the court below committed in misinterpreting the *Beck* decision is illuminated by *Zenith Radio Corp. v. United States*, 437 U.S. 443, 459-462 (1978). The

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[14]Nor do defendants like Evans have any basis for complaint about the jury verdict form used in pre-*Beck* cases. Its only possible effect would be to encourage the jury to acquit a defendant who should be convicted. *Beck v. Alabama*, 447 U.S. at 639-640, 642-643. Since there was only a 4% acquittal rate, *id.* at 641 & n. 18, there is no evidence that the verdict form resulted in any improper acquittals.

In any event, Evans should not be heard to complain about being convicted under a procedure which might have encouraged the jury to erroneously *acquit* him. If the verdict form procedure erred in the present case, it erred in Evans' favor, and Evans was convicted in spite of it, not because of it.

holding reached in *Zenith* was contrary to "certain broad language," *id.*, at 460-461, in an earlier opinion dealing with the same subject matter. While recognizing that the language would be controlling if taken out of the context of that earlier case, this Court refused to do so, because even though the literal language seemed to cover the issue at hand in *Zenith*, "neither the parties nor this Court [had] focused carefully" on that issue in the earlier case, and it had not been argued then. *Id.*, at 460-462. Since "general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used," *id.*, at 462, this Court felt free in *Zenith* to address the issue raised by the facts of that case unconstrained by the broad language of the prior case which had involved different facts. Likewise, this Court is free from *Beck*'s broad "in every case" language, because the issue here, being well outside *Beck*'s carefully limited certiorari and holding, 447 U.S. at 627, was neither in focus nor argued there.

In a case involving Evans' co-defendant, *Ritter v. State*, No. 77-798 (Ala. 1981) (on rehearing), three justices of the Alabama Supreme Court concluded that the *Beck* decision did not mandate the reversal of a pre-*Beck* conviction in the unusual case where the record affirmatively and undisputably eliminates any possibility that the defendant was harmed by the existence of the preclusion clause. *Id.*, slip op. at 6-8, (Jones, J., joined by Maddox and Adams, J.J., concurring in part and dissenting in part), pp. 2a - 7a, *infra; id.*, at 10-11 (separate opinion of Maddox, J.), pp. 8a -9a, *infra.*[15] That is the correct interpretation of the *Beck*

[15]Those three justices of the Alabama Supreme Court were out-voted by a six-member majority which concluded, "consistent[ly] with the interpretation of that decision reached by the Fifth Circuit," that the *Beck* decision "compelled" the reversal of all pre-*Beck* capital convictions regardless of the facts. *Ritter v. State, supra*, slip op. at 2 (majority opinion), pp. 1a - 2a, *infra; id.*, at 3 (Torbert, C.J., concurring specially), p. 2a, *infra.*

The fact that a majority of the Alabama Supreme Court, influenced by the two-member majority in the court below, joined that court in misinterpreting the *Beck* decision simply proves that this Court needs to correct both courts. This Court has the opportunity to correct the Alabama Surpeme Court's misinterpretation of *Beck* in *Alabama v. Ritter*, No. 81-247 (certiorari filed August 6, 1981).

decision.

II.

EVANS' CONVICTION SHOULD NOT HAVE BEEN SET ASIDE BECAUSE HE WAS NOT HARMED OR PREJUDICED IN ANY WAY BY THE EXISTENCE OF THE PRECLUSION CLAUSE

A. The Existence of the Preclusion Clause Did Not Harm or Prejudice Evans In Any Way

The determination whether Evans was harmed or prejudiced by the preclusion clause should be based on a two-part inquiry. First, the record should be examined to determine whether, in view of the evidence at trial, the jury which convicted Evans would have been instructed on any lesser included non-capital offenses had it not been for the preclusion clause. If the answer is no, the second inquiry should be whether the record establishes that the preclusion clause caused Evans to forego presentation of lesser included offense evidence that he would otherwise have presented at trial. The answer to both inquiries is no.

1. No Lesser Offense Instructions Would Have Been Given Anyway Because There Was No Evidence to Support Them

Under Alabama law, a defendant is entitled to a lesser included offense instruction only if there is some evidentiary basis for it — some basis in the evidence from which the jury could reasonably conclude that the defendant is innocent of the higher offense but guilty of some specific lesser offense. *See, e.g., Beck v. Alabama*, 447 U.S. at 630 n. 5, *quoting Fulghum v. State*, 291 Ala. 71, 75, 277 So. 2d 886, 890 (1973) (a lesser offense instruction should be given if "there is any reasonable theory from the evidence which would support the position."); *Harris v. State*, 398 So. 2d 777, 778-779 (Ala. Cr. App.), *cert. denied*, 398 So. 2d 780 (Ala. 1981); *Gray v. State*, 394 So. 2d 92, 94-95 (Ala. Cr.

App.), *cert. denied*, 399 So. 2d 840 (Ala. 1981). As the Alabama Supreme Court said when it severed the preclusion clause from the remainder of the capital punishment statute in the *Beck* case on remand: "[a]bsent the fourteen words which constitute the preclusion clause, the long established Alabama statutory and common law rule will apply so that juries in capital cases will be instructed on any lesser included offenses supported by the evidence." *Beck v. State*, 396 So. 2d 645, 657 (Ala. 1981) (on remand).

All four members of the Alabama Supreme Court who spoke to the point in *Ritter v. State*, No. 77-798 (Ala. 1981) (on rehearing), agreed that that court's *Ritter* decision in no way affected "the traditional rule that a jury instruction on a lesser included offense is appropriate if, and only if, there is evidence of a lesser offense." *Id.*, slip op. at 3 (Torbert, C.J., concurring), p. 2a, *infra; id.*, at 11, (Maddox, J., joined by Jones and Adams, J.J., concurring specially in the denial of rehearing) (noting that "there is no disagreement among the members of the Court" that the decision "is not to be understood as requiring the trial court to instruct the jury on lesser included offenses unless such an offense is supported by the evidence upon retrial of this cause."), p. 9a, *supra*.[16 & 17]

The preclusion clause operated only in those cases, like *Beck*, where there was an evidentiary basis for lesser

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[16]While not disagreeing with the four justices who specifically pointed out that lesser included offense instructions should only be given when supported by the evidence at trial, the majority in *Ritter v. State*, *supra*, concluded that the *Beck* decision mandated the reversal of that case, anyway. See n. 15 on p. 21, above.

[17]*Code of Alabama* 1975, §13-1-73 requires that the jury in a first degree murder case be instructed on second degree murder regardless of the evidence, but that statute does not apply to capital cases as is evident from the separate opinions of the four justices in the *Ritter* case, discussed in the text, above.

If Evans seriously contends that he would have been entitled to a lesser included offense instruction absent the preclusion clause, either because of §13-1-73 or for any other reason, then that contention supports Alabama's position that the court below erred in not certifying to the Alabama Supreme Court Question No. 1(c) in Alabama's certification motion. (A. 68-69) See pp. 42 - 46, *infra*.

included offense instructions which would have been given had the clause not prevented it. The preclusion clause did not operate in Evans' trial and had no effect on the instructions his jury received, because there was no evidentiary basis for any lesser offense instructions. See pp. 4 - 7, *supra*. No judge who has examined the record has ever suggested to the contrary.

In the case of Evans' jointly tried co-defendant, the three Alabama justices who examined the record were convinced that he would not have been entitled to jury instructions on any lesser offense anyway, *Ritter v. State*, *supra*, slip op. at 4 (opinion of Jones, J., joined by Maddox and Adams, J.J.), pp. 5a - 7a, *infra*, and they were convinced of that beyond "[a]ny reasonable doubt." *Id.*, at 6, p. 5a, *infra*. Those Alabama justices found that:

> Indeed, to the minutest detail, the State's proof of each and every element of the capital offense is verified and amplified by Ritter's own testimony. In addition to pleading guilty of the capital crime as charged, he took the witness stand — against advice of counsel and following the trial court's thorough admonition as to his constitutional rights — and recounted in great detail his and his companion's trail of crime leading up to and including the murder of the pawnshop proprietor during a planned armed robbery of the victim, agreeing in advance to kill the robbery victim if necessary.
>
> The posture of this record affirmatively precludes any reasonable hypotheses other than that of Defendant's guilt of the capital crime as charged in the indictment. Where, as here, the voluntary testimony of a mentally competent defendant affirmatively eliminates any possible inference which would support a finding of guilty of a noncapital lesser included offense, we are constrained to hold that the unconstitutional provision excised by *Beck* visited no impermissible restraint upon the Defendant in the conduct of his defense, including his right to actively contest the charges against him.

Id., at 7-8, p. 6a, *infra*. *Accord, id.*, at 10-11 (separate opinion of Maddox, J.) ("That there was absolutely *no evidence* of Ritter's guilt of a lesser included offense is plain ..."), p. 8a, *infra*. While those conclusions were reached during review of Ritter's conviction, they are equally applicable to Evans. Ritter and Evans were jointly tried, they both pursued the same self-destructive course at trial, the evidence presented against them was materially identical, and each testified in same manner against himself.[18] Thus, the answer to the first inquiry is that Evans, like Ritter, would not have received a lesser offense instruction if the preclusion clause had never existed.

2. Evans' Course of Conduct Was Not Affected by the Preclusion Clause Which Did Not Prevent or Discourage Him from Presenting Any Lesser Offense Evidence

The record shows that Evans' self-destructive legal strategy was not caused by the preclusion clause, because Evans began that strategy before he had any opportunity to know about the clause. Even before his capture, Evans "figured that I would get the electric chair anyway, you know, some place." (A. 20) He had even offered to turn himself in to an F.B.I. agent if the agent could guarantee Evans that he would get the death penalty, something the agent was unable to do. (A. 22) Within hours of his capture in Arkansas, Evans voluntarily confessed his long string of violent crimes, including this robbery-murder, to F.B.I. agents there. (A. 6-7; Tr. 156-158, 167-173) Within four days of his capture, Evans had waived extradition, confessed again to Mobile authorities, and declared that he wanted to be sentenced to death as soon as possible. (Tr. 288-292, 331) There is no evidence that Evans had even heard of the preclusion clause then, nor is there any evidence that his unwavering pursuit of execution thereafter — at arraignment, before the grand jury, and at trial —was

[18]The only difference of note was that the evidence established without dispute that Evans and not Ritter was the actual triggerman (A. 11-12, 38, 41), a distinction which does not favor Evans.

influenced by the clause.

Evans followed the post-arrest course of action that he did for two reasons. One was that such thrasonic behavior was his ticket to instant notoriety and satisfied Evans' perverted desire to bask in what was to him the warm glow of infamy. That is why Evans recounted his crimes at every opportunity. (A. 6-23; 38-42; 288-292)[19]

The second reason or motivation for Evans' behavior was that after his long string of crimes had caught up with him, he simply did not want to spend the rest of his life locked up in prison, or serve a long prison sentence. That is what Evans told the grand jury: "I'm asking to be electrocuted in a, uh, chair, because I can't see spending the rest of my life in a penitentiary, you know, I'm too young for that." (A. 18) That is what the psychiatrist who examined Evans concluded: "He is sincere in seeking the death sentence, preferring extinction to a long prison sentence." (A. 28) And that is what the Alabama Court of Criminal Appeals, after "[a] careful reading of this record," found as a fact: "This Court is convinced that each appellant is sincere in seeking the death penalty, preferring this course to a long prison sentence." *Evans v. State*, 361 So. 2d 654, 662 (Ala. Cr. App. 1977).[20] Under 28 U.S.C. §2254(d), as interpreted in *Sumner v. Mata*, 101 S. Ct. 764 (1981), the state appellate

[19]Evans achieved the first goal of his behavior. Every stage of his prosecution was the subject of massive media coverage. (Tr. 52, 62, 71, 92-93, 95, 255) *See generally, Evans (Betty) v. Bennett*, 467 F. Supp. 1108, 1110 (S.D. Ala. 1979) ("as the media has advertised"). Not only was Evans the lead story of Alabama newspapers, radio, and television for days, but he also received attention in the national media. *E.g.*, N.Y. Times, Apr. 2, 1979, at A12; *id.*, Apr. 3, 1979, at A17; *id.*, Apr. 5, 1979, at A20; *id.*, Apr. 6, 1979, at A15.

[20]In addition, *see, Evans (Betty) v. Bennett*, 467 F. Supp. 1108, 1110 (S.D. Ala. 1979) ("it may well be, as the media has advertised, that John Evans has confronted his option of life imprisonment or death by execution and has elected to place his bets on a new existence in some other world beyond this."); *see generally*, N.Y. Times, Apr. 5, 1979, at A20 (quoting Evans as stating, "I choose to die because I want to be free . . . I must have my physical freedom. It is an obsession with me. There is a driving force within me that demands I be free. I choose this way.").

court factfinding that Evans' course of action at trial was caused by his desire to avoid a long prison term is presumptively correct. Accordingly, it should be taken as given that Evans' course of action was caused not by the preclusion clause but rather by his own preference for execution instead of a long prison term.[21]

Without disputing that, the two-judge majority below said:

> It seems to us, however, that it offends the most fundamental notions of fairness for the state first to tell Evans that there is no lesser offense and then later urge that his death sentence should be upheld because he failed to present evidence which would prove a lesser included offense.

628 F. 2d at 401 (Pet. App. 20a). That statement misapprehends Alabama's position and disregards the nature of the preclusion clause when viewed against the particular facts in this case. Alabama's position is not just that the evidence at Evans' trial did not justify any lesser offense instructions, but is also that Evans has never proven, or even alleged, that his failure to present lesser offense evidence was caused by the existence of the preclusion clause. And the record actually establishes that it was not. See pp. 25 - 26, above.

The majority below is also wrong because the state through the preclusion clause did not "tell Evans that there is no lesser offense." 628 F. 2d at 401 (Pet. App. 20a). Although the clause did bar the jury from convicting a capital defendant of a lesser included non-capital offense, it did not prevent the defendant from presenting lesser offense evidence and putting forth the defense that he was due to be acquitted of the capital charge because he was guilty of only a lesser offense. That is exactly what defendant Beck did in *Beck v. Alabama*, 447 U.S. at 629-630. Nor did the preclusion clause discourage the presentation of

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[21]Evans' initial preference for execution over lengthy imprisonment is not unique, since three of the four murderers executed in this country since 1967 also made that same choice. *Do Judges Make Death Penalty an Empty Threat?*, U.S. News & World Report, May 11, 1981, at 72.

lesser offense evidence, at least not in the case of Evans and his co-defendant Ritter. In Ritter's appeal, Justice Jones of the Alabama Supreme Court stated that:

> Aided by the Court of Criminal Appeals' summary of the evidence in *Evans and Ritter v. State*, 361 So. 2d 654, 656-661 (Ala. 1977), and *Ritter v. State*, 375 So. 2d 266, 267 (Ala. 1978), and by this Court's opinion, after return of the case from remand (*Ritter v. State*, 375 So. 2d 270, 273 (Ala. 1979)), I have again made an independent review of the entire record in a painstaking search for the slightest hint that Ritter was restricted, or otherwise influenced, in the conduct of his defense by the omnipresence of the statutory edict that the jury either sentence him to die or set him free. I find none.

Ritter v. State, *supra*, slip op. at 7 (opinion of Jones, J., joined by Maddox and Adams, J.J.), p. 6a, *infra*.[22] What the record proves about Ritter, it also proves about Evans, for the reasons stated on p. 25, *supra*.

Not only did the preclusion clause not restrict or discourage Evans from presenting lesser included offense evidence, but, in fact, *if the preclusion clause had any effect at all on Evans that effect was actually to encourage Evans to present lesser offense evidence.* That is true, because if the preclusion clause had not existed and Evans had attempted to escape a capital conviction by proving himself guilty of the lesser included non-capital offenses applicable to his crime, Evans would have guaranteed himself a very long term in prison — the very thing he wanted to avoid, even to the point of preferring death instead.[23] In view of his over-

[22]The other six members of the Alabama Supreme Court did not disagree with this finding, but instead misinterpreted this Court's *Beck* decision as mandating reversal regardless of the facts. See n. 15 on p. 21, above.

[23]Given the prosecution's evidence against Evans, there is only one lesser included offense strategy that he even conceivably could have attempted. That strategy would have been for Evans to put on some evidence that even though he shot Nassar in the back, he somehow lacked intent to kill which is a necessary element of the *Code of Alabama* 1975,

riding desire to be free or die, it was only because the preclusion clause did exist that Evans had everything to gain and absolutely nothing to lose by attempting to prove that he was guilty of lesser included non-capital offenses rather than the capital offense. By removing the guaranteed minimum cost of a lesser offense strategy — a long prison sentence — the existence of the preclusion clause encouraged a defendant like Evans, who wanted to go free or die, to come forward with lesser offense evidence he otherwise might not have presented. *Cf.*, Tr. Oral Arg., *Beck v. Alabama* (U. S. Oct. Term, 1979, No. 78-6621), at 8 (Blackmun, J., noting that some defendants would prefer to forego lesser offense options in order to increase their chances of outright acquittal).

In summary, although the preclusion clause did operate unconstitutionally when evidence of lesser offenses was presented at trial, it did not prevent the presentation of lesser offense evidence, and whatever effect it may have had on other defendants, the existence of the clause actually acted as an incentive for Evans to present such evidence. The fact that Evans did not respond to the incentive provided by the preclusion clause simply shows that he was so hell-bent on self-destruction that he was not affected by the preclusion clause or by anything else.

The conclusion of the two-judge majority below that Alabama is being fundamentally unfair to Evans is based upon its speculation that the preclusion clause was a "brooding omnipresence" which affected every aspect of Evans' trial, 628 F. 2d at 401 (Pet. App. 19a - 20a), speculation that flies in the face of a record which proves the contrary. Alabama is not being fundamentally unfair to Evans. The Mr. Evans on whose behalf the court below

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§13-11-2(a)(2) capital offense but not of its §13-3-110 robbery component and its §13-1-70 first degree murder (i.e., felony murder) component. *See, Beck v. Alabama*, 447 U.S. at 630 & n. 5. If the preclusion clause had not existed and Evans had tried and somehow succeeded in getting the jury to convict him of the lesser offenses of robbery and murder, he would have received a mandatory life sentence for the murder conviction, *Code of Alabama* 1975, §13-1-74, plus an additional sentence of not less than ten years for the robbery. §13-3-110.

reached that conclusion is the same Mr. Evans who first derived great pleasure from committing several dozen violent crimes, including the brutal murder of the innocent victim in this case, and then took such delight in bragging about his crimes at every available opportunity. What *is* fundamentally unfair is the rule adopted by the court below which conclusively presumes harm and prejudice from nothing more than sheer speculation.

B. Since Evans Was Not Harmed or Prejudiced by the Preclusion Clause, His Conviction Should Not Have Been Set Aside

Because Evans was not harmed or prejudiced in any way by the existence of the preclusion clause, his due process rights were not violated. Alternatively, assuming that the mere existence of the preclusion clause did somehow violate Evans' constitutional rights, his conviction still should not have been set aside, especially not in a habeas corpus proceeding, absent a showing of harm and prejudice.

1. Prejudice is an Essential Component of a Due Process Fundamental Fairness Claim

The Fourteenth Amendment guarantee of due process is, in essence, a guarantee of fundamental fairness. *E.g.*, *Ingraham v. Wright*, 430 U.S. 651, 675 (1977); *Donnelly v. De Christoforo*, 416 U.S. 637, 642 (1974). Since a defendant cannot logically be said to have been treated unfairly by something which did not affect him, the requirement of harm and prejudice is inherent in the very concept of due process fundamental fairness. In *Beck v. Washington*, 369 U.S. 541 (1962), the due process claim of a defendant who could not prove that he had been actually prejudiced by the voluminous pretrial publicity about his case was rejected, because:

> "While this Court stands ready to correct violations of constitutional rights, it also holds that 'it is

> not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality.' " United States ex rel. Darcy v. Handy, 351 U.S. 454, 462, 76 S. Ct. 965, 100 L. Ed. 1331 (1956). This burden has not been met.

Id., at 558. Likewise, in *Donnelly v. De Christoforo*, 416 U.S. 637 (1974), this Court held that improper prosecutorial remarks to the jury do not violate due process unless the remarks are "sufficiently prejudicial." *Id.*, at 639. Whether the defect be one of omission or commission, faulty jury instructions violate due process fundamental fairness only if they are known to have caused prejudice. The failure to instruct on an essential element of the crime in *Henderson v. Kibbe*, 431 U.S. 145 (1977), did not violate due process because the possibility of prejudice from that omission was, "too speculative to justify the conclusion that constitutional error was committed," *id.*, at 157; and, in *Cupp v. Naughten*, 414 U.S. 141 (1973), this Court ruled that the giving of an instruction that was "undesirable, erroneous, or even 'universally condemned,' " *id.*, at 146, did not violate due process absent actual prejudice. *Id.*, at 147.

Prejudice is a necessary element of a due process claim concerning pre-indictment delay. *United States v. Lovasco*, 431 U.S. 783, 789-790 (1977); *United States v. Marion*, 404 U.S. 307, 325-326 (1971) ("the real possibility of prejudice inherent in any extended delay" is not sufficient, and defendants must "demonstrate actual prejudice"). Prejudice is also a prerequisite of a due process claim involving the suppression of exculpatory evidence, as *United States v. Agurs*, 427 U.S. 97 (1976), makes clear. While *Agurs* phrases this prejudice component in terms of the "materiality" of the suppressed evidence, it notes that "implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial," 427 U.S. at 104, and it recognizes that the concept of materiality measures the prejudice the defendant suffered because of the suppression. *See*, 427 U.S. at 104 n. 10, 111-112.

Therefore, a denial of due process fundamental fairness in the suppression of evidence context addressed in *Agurs*, as in other areas, is dependent on the existence and extent of prejudice suffered by the defendant.

Recognizing that the record shows that Evans had not been prejudiced by the existence of the preclusion clause, the majority below relied on *Davis v. Alaska*, 415 U.S. 308, 318 (1974), for the proposition that certain constitutional errors are such that no showing of want of prejudice can cure them. 639 F. 2d at 224 (Pet. App. 12a). However, *Davis v. Alaska, supra*, did not even purport to address the prerequisites for a due process fundamental fairness claim, but instead involved a denial of the Sixth Amendment right to confrontation. This Court has recognized that when a state has denied or significantly impaired a benefit specifically guaranteed in the Bill of Rights, a showing of prejudice is not always necessary as it would be if the claim were that due process fundamental fairness had been denied. *Donnelly v. De Christoforo*, 416 U.S. at 643.[24] Since Evans was denied no specific Bill of Rights guarantee, *Davis v. Alaska, supra*, and cases like it are inapposite.[25]

Admittedly, in some circumstances the denial of a specific procedural or substantive right which has been recognized as encompassed within the due process right to fair trial may not require proof of actual prejudice. *See, e.g., Witherspoon v. Illinois*, 391 U.S. 510 (1968) (denial of due process right to an impartial jury). Indeed, *Beck v. Alabama*, 447 U.S. 625 (1980), which recognized the due process right to lesser included non-capital offense

[24]Even when a specific Bill of Rights guarantee is involved, a showing of prejudice is sometimes essential to establish infringement. *See, e.g., Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980).

[25]The equal protection case of *Rose v. Mitchell*, 443 U.S. 545 (1979), is also inapposite. The ruling there was expressly based on the special concern of the Equal Protection Clause with racial discrimination, *id.*, at 554-555; on the strength of the Court's own commitment to end racial discrimination, *id.*, at 558; and on decades of stare decisis, *id.*, at 554-557; *id.*, at 593-594 (Stevens, J., dissenting in part). None of those factors is present here.

instructions when such instructions are supported by the evidence, is itself an example. But Evans' claim does not fit within the right recognized in *Beck*, because there was no evidentiary basis for a lesser offense instruction in his case, see pp. 22 - 25, *supra*, nor does it fit within any other recognized specific due process right. Instead, it is a due process fundamental fairness claim, and accordingly actual prejudice must be shown, and it must be shown "not as a matter of speculation but as a demonstrable reality." *Beck v. Washington*, 369 U.S. at 558.

2. Even Where There is a Constitutional Violation a Conviction Should Not Be Set Aside Absent Harm

Assuming for purposes of argument that the mere existence of the preclusion clause violated some constitutional right of Evans, his conviction should not have been set aside because the violation, if any, was harmless. This Court has recognized "the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests," *United States v. Morrison*, 101 S. Ct. 665, 668 (1981), and it has ruled accordingly. *See e.g., id.*, at 667-669 (remedy for violation of right to counsel dependent on extent of harm caused by the infringement); *United States v. Blue*, 384 U.S. 251, 255 (1966) (remedy for violation of Fifth Amendment is exclusion of statement, not barring the prosecution); *Brady v. Maryland*, 373 U.S. 83, 88-90 (1963) (remedy for suppression of evidence material only to sentencing is limited to ordering a new sentence proceeding).

Even where a constitutional violation stems from "the egregious behavior of the governmental agents," no remedy is to be imposed on direct or collateral appeal in the absence of harm. *United States v. Morrison*, 101 S. Ct. at 669.[26] Therefore, even if the existence of the preclusion

[26] In any event, it is undisputed that the preclusion clause stemmed not from any malevolent intent but instead was the result of a good faith but mistaken interpretation of the *Furman v. Georgia*, 408 U.S. 238 (1972), decision. *Beck v. State*, 396 So. 2d 645, 656-657 (1980) (on remand).

clause did violate some constitutional right of Evans, his conviction should not be set aside because he was not actually harmed by it. See pp. 22 - 30, *supra*.

The statement of the majority below, 628 F. 2d at 401 (Pet. App. 19a - 20a), that it could not conclude that being tried under an unconstitutional statute was harmless beyond a reasonable doubt to Evans under *Chapman v. California*, 386 U.S. 18 (1967), should be rejected for three reasons. First, it mischaracterizes the inquiry, because the entire statute was not unconstitutional. *See, Beck v. State*, 396 So. 2d 645 (1980) (on remand). The problem with the statute was that part of it operated unconstitutionally in certain circumstances, but those circumstances were not present in Evans' case. The correct formulation is whether the existence of the preclusion clause was harmless in a case in which it did not operate and had absolutely no effect. The majority below asked the wrong question. Secondly, to the extent that the majority's conclusion could be interpreted to be a factfinding that the preclusion clause harmed Evans, it is plainly erroneous and is flatly contradicted by the record.

Thirdly, the majority's conclusion is not actually a factfinding at all but instead is a supposition based on sheer speculation. The majority supposed that "the offensive statute *would* infect," and speculated that it "*inevitably* influenced," 628 F. 2d at 401 (emphasis added) (Pet. App. 19a -20a), but the majority did not examine the record to test that speculation. The only judges who have done so concluded beyond a reasonable doubt after a "painstaking search" of the entire record that there was not even "the slightest hint" therein that the preclusion clause caused any harm in the joint trial of Evans and his co-defendant. *Ritter v. State*, No. 77-798 (Ala. 1981) (on rehearing), slip op. at 6-7 (opinion of Jones, J., joined by Maddox and Adams, J.J.), pp. 5a - 6a, *infra*, discussed on pp. 25 - 25, *supra*.[27]

[27] A fourth and more fundamental reason that the *Chapman* conclusion of the majority below should be rejected is that it assumes that the existence of the preclusion clause violated Evans' constitutional rights. As explained on pp. 30 - 33, *supra*, since Evans has not shown that the preclusion clause prejudiced him, he has not established that it violated

3. Proof of Harm and Prejudice is Especially Important in Habeas Corpus Proceedings

The burden of proving a constitutional violation is on the petitioner in a habeas corpus proceeding. *E.g., Rose v. Mitchell*, 443 U.S. 545, 564-565 (1979); *Walker v. Johnston*, 312 U.S. 275, 286 (1941); *cf., Swain v. Alabama*, 380 U.S. 202, 226-227 (1965) (certiorari petitioner). Except in the most extraordinary cases, a habeas petitioner must both allege and demonstrate prejudice to obtain the writ. *E.g., Lockett v. Blackburn*, 571 F. 2d 309, 314 (5th Cir.), *cert. denied*, 439 U.S. 873 (1978).[28] Furthermore, because issuance of habeas writs undercuts finality, and "inflicts substantial costs on society, our system of justice and our federal fabric," *Rose v. Mitchell*, 443 U.S. at 579-588 (Powell, J., concurring), a greater showing of prejudice is required to overturn a conviction on habeas than on appeal. *E.g., Henderson v. Kibbe*, 431 U.S. 145, 154 (1977).

At the outset of this proceeding, the district court ordered Evans and his attorneys to amend their petition "to aver each and every ground that they can conceivably think of that can be asserted under the conditions prevailing in this factual situation" and warned them that any ground not asserted would be presumed waived. (A. 55) Notwithstanding that order, Evans has never even alleged that the preclusion clause prejudiced him (R. 1-8, 52-53), and such allegations would, in any event, run afoul of this Court's admonition that:

> Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is

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his due process right to fundamental fairness. Until such a consitutional violation is established by proof of prejudice, there is no occasion for a *Chapman* analysis. By getting the cart before the horse, the majority below improperly shifted the burden of proof on the harm and prejudice issue to Alabama whereas it should have been on Evans, at least initially, given the fact that he is claiming a denial of fundamental fairness.

[28] *Rose v. Mitchell, supra*, is an exception, but it is distinguishable from the present case for reasons discussed in n. 25 on p. 32, *supra*.

> subject to summary dismissal, as are contentions that in the face of the record are wholly incredible.

Blackledge v. Allison, 431 U.S. 63, 74 (1977) (citations and footnote omitted). After voluntarily confessing his guilt to the F.B.I. (A. 6-7), to state officers (Tr. 288-292, 331), and to the grand jury (A. 8-23), Evans solemnly declared in open court at arraignment (A. 24) and at trial (A. 33-42) that he was guilty of the capital offense. The court below disregarded those solemn declarations and did so based on nothing more than that court's own contentions — never even pleaded by Evans — which in the face of the record are wholly incredible. In short, it abused the Great Writ.

III.

EVANS' CONVICTION SHOULD NOT HAVE BEEN SET ASIDE BECAUSE HIS GUILTY PLEA WAIVED THE PRECLUSION CLAUSE ISSUE AND RENDERED THE CLAUSE CONSTITUTIONALLY IRRELEVANT

Another independently adequate reason Evans' conviction should not have been set aside is that he entered a valid guilty plea which waived any defect in the preclusion clause and rendered it constitutionally irrelevant.

A. Evans' Guilty Plea Was Accepted and Under Alabama Law a Guilty Plea Does Have Effect

Evans pleaded guilty at arraignment (A. 24-25; Tr. 48-54), and that plea was accepted and entered in the official minutes of the court. (A. 26, 46) Evans also pleaded guilty at trial via a written motion to plead guilty which was accepted into evidence. (A. 33-37; Tr. 252) *Accord*, *Evans v. State*, 361 So. 2d 654, 655-656, 661 (Ala. Cr. App. 1977); *Evans v. Birtton*,[29] 472 F. Supp. 707, 711-712 n. 2 (S.D. Ala. 1979) (Pet. App. 53a, 119a - 120a). It is undis-

[29]See n. 1 on p. 1, *supra*.

puted that his guilty plea was voluntary and was taken in compliance with *Boykin v. Alabama*, 395 U.S. 238 (1969). *See*, 472 F. Supp. at 711 (Pet. App. 53a - 54a).

Contrary to the conclusion of the majority below, 639 F. 2d at 222-223 (Pet. App. 4a - 8a), the fact that the case against Evans was submitted to a jury does not indicate that his guilty plea was rejected. As the district court explained:

> the conviction was predicated not only on a jury verdict, but also upon a voluntarily made informed guilty plea by the petitioner. Accordingly, the conviction attacked here is not just the result of the jury's deliberations, but additionally is the result of informed conduct on the part of the petitioner. The fact that the matter was subsequently tried to a jury resulted not from a rejection of the guilty plea by the trial court, but rather from Alabama practice of submitting all capital cases to a jury, regardless of what plea is entered. *See Prothro v. State*, 370 So. 2d 740 (Ala. Cr. App. 1979). Having pled guilty to the charges, the petitioner is thereby estopped to challenge the validity of the conviction on other than jurisdictional grounds. *See, e.g., Richardson v. Beto*, 472 F. 2d 169 (5th Cir. 1973).

472 F. Supp. at 712 n. 2 (Pet. App. 119a - 120a).[30] Alabama's requirement that capital guilty pleas be submitted to the jury with additional proof serves two purposes. First, by effectively preventing waiver of a jury, it avoids the *United States v. Jackson*, 390 U.S. 570 (1968), problem. *Prothro v. State*, 370 So. 2d 740, 742-747 (Ala. Cr. App. 1979). Secondly, it carries out this Court's *Brady v. United States*, 397 U.S. 742, 758 (1970), command that courts ensure

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[30] Alabama's capital guilty plea procedure, which is a matter of decisional law insofar as the 1975 statute under which Evans was convicted is concerned, *see*, *Prothro v. State*, 370 So. 2d 740 (Ala. Cr. App. 1979), is spelled out in Alabama's new 1981 capital punishment statute. *See*, 1981 Alabama Acts, No. 81-178, §4. (The new act applies to offenses committed after July 1, 1981. *Id.*, at §§19, 24.)

themselves that there is a factual basis for guilty pleas.[31]

Under Alabama law, a capital case guilty plea is conclusive on the factual guilt issue when, but only when, the state presents sufficient evidence in addition to the plea for the jury to find the defendant guilty.[32] Once the jury has returned a guilty verdict based on the plea and additional evidence, the issue of factual guilt is conclusively determined, save only that the sufficiency of the evidence to support the verdict may be reviewed on appeal. Any other defects in the factfinding process may not be reviewed, and all non-jurisdictional defects are waived by the guilty plea. *E.g., Ritter v. State*, 375 So. 2d 270 275-276 (Ala. 1979) (guilty plea renders harmless any errors in jury instructions in a capital case), *vacated and remanded*, 448 U.S. 903 (1980), *rev'd*, No. 77-798 (Ala. 1981), *certiorari pending*, No. 81-247 (U.S. filed August 6, 1981); *Graham v. State*, No. 4 Div. 787 (Ala. Cr. App. 1980), slip op at 16 (guilty plea in an Alabama capital case waives any non-jurisdictional defect), *writ quashed as improvidently granted*, No. 79-568 (Ala. 1981).

The majority below's holding that Evans' guilty plea was rejected, 639 F. 2d at 222 (Pet. App. 4a - 8a), flies in the face of the record and misapprehends state law. If the plea had been rejected, it would not have been reflected in the official minutes of the court (A. 26, 46), nor would Evans' motion to plead guilty have been admitted into evidence

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[31]Contrary to the suggestion below, 639 F. 2d at 223 n. 2 (Pet. App. 14a), the Constitution does not forbid Alabama's alteration of guilty plea doctrine in capital cases to require proof of guilt notwithstanding the plea, an alteration favorable to defendants. *See, Lefkowitz v. Newsome*, 420 U.S. 283 (1975) (implicitly approving constitutionality of removing non-jurisdictional defect waiver effect of guilty pleas); *see generally, North Carolina v. Alford*, 400 U.S. 25, 28, 32, 38 (1970) (guilty plea valid despite protestations of innocence where additional evidence of guilt presented).

[32]*Ex parte Sankey*, 364 So. 2d 362, 363 (Ala. 1978), *cert. denied*, 440 U.S. 964 (1979), cited below, 639 F. 2d 223 n. 2 (Pet. App. 14a), is not to the contrary, because it is not a capital case. Alabama's special rule concerning guilty pleas applies only in post-*Furman* capital cases. *See, Prothro v. State*, 370 So. 2d 740 (Ala. Cr. App. 1979).

and made part of the record. (A. 33-37; Tr. 252, 285-286) As the district court explained, see p. 37, *supra*, the case went to the jury not because the guilty plea was rejected but because under Alabama law all capital cases are submitted to a jury. Since the Fifth Circuit itself has recognized that a federal district judge's determination of the law of his state is entitled to great weight on review, *Avery v. Maremont Corp.*, 628 F. 2d 441, 446 (5th Cir. 1980), the majority below should have heeded that explanation instead of ignoring it.

The Alabama Supreme Court did say in *Ritter v. State*, 375 So. 2d at 276, that instead of accepting Ritter's guilty plea the trial judge set the matter for presentation to a jury. However, the Alabama Supreme Court also held on that same page of the *Ritter* opinion that his guilty plea rendered harmless and waived a very serious defect in the jury instructions which would otherwise have required reversal. *Id.*, at 276.[33] Therefore, while the guilty pleas of Evans and Ritter were not accepted in lieu of a jury verdict, they were effective to render harmless or waive any non-jurisdictional defects in the proceedings.[34] That is the special Alabama rule in capital cases.

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[33]The defect was the total failure to instruct the jury on the elements of robbery, *id.*, which would have been reversible error had the guilty plea not been effective to waive that omission and render it harmless.

[34]That Alabama appellate courts reviewed various constitutional issues in the case does not mean that Evans' guilty plea did not waive non-jurisdictional defects, because determination of whether there are *any* defects is the necessary first step in determining whether there are any jurisdictional defects. For example, the unconstitutionality of part of a statute is not a jurisdictional defect if that part is severable, *see, Brady v. United States*, 397 U.S. 742 (1970), but unconstitutionality of a part then determined to be non-severable would be a jurisdictional defect since the total invalidity of the statute would bring into question the very power of the state to bring a defendant into court to answer a charge under that statute. *Cf., Blackledge v. Perry*, 417 U.S. 21, 29-30 (1974); *Haynes v. United States*, 390 U.S. 85, 87 n. 2 (1968). Therefore, examination of constitutional claims by the Alabama appellate courts does not mean that those claims were not waived if determined to be non-jurisdictional, but simply that the courts were conducting the first step of what would have been a two-step analysis to determine if there were any jurisdictional defects.

Any doubt about the state law status of Evans' guilty plea supports Alabama's contention that Question No. 1(d) of the certification motion (A. 69) should have been certified to the Alabama Supreme Court. See pp. 42 - 46, *infra*.

B. Evans' Guilty Plea Waived the Preclusion Clause Issue and Rendered the Clause Constitutionally Irrelevant

As *Brady v. United States*, 397 U.S. 742 (1970), establishes, the unconstitutionality of a severable part of a statute under which a defendant pleads guilty is waived by the guilty plea. In *United States v. Jackson*, 390 U.S. 570 (1968), this Court ruled unconstitutional the death penalty provision of the federal kidnapping statute and severed it from the remainder of the statute. *Brady* held that even where a pre-*Jackson* defendant pleaded guilty because of the defect in the statute, *id.*, at 749-750, his plea still operated as a valid waiver of his constitutional rights. The preclusion clause was a severable part of Alabama's capital statute, *Beck v. State*, 396 So. 2d 645, 656-659 (Ala. 1980), and even assuming that the existence of it violated Evans' constitutional rights — which it did not — under *Brady* that violation is a non-jurisdictional defect waived by his guilty plea. *Cf., e.g., McMann v. Richardson*, 397 U.S. 759, 773-774 (1970); *Brickhouse v. Zahradnick*, 553 F. 2d 340, 341-342 (4th Cir.), *cert. denied*, 434 U.S. 938 (1977).

The holding of the majority below that a guilty plea waives only constitutional challenges to proceedings which arise *before* the plea is entered, 639 F. 2d at 223 (Pet. App. 8a - 11a), is wrong. While cases like *Tollett v. Henderson*, 411 U.S. 258, 267 (1973), do establish that one effect of a guilty plea is to waive constitutional defects occurring prior to the plea, this Court has never limited the waiver effect of a guilty plea to antecedent defects. Because the defect involved in *Brady v. United States*, *supra*, concerned the punishment provisions of the statute, it cannot be categorized as a defect antecedent to the plea. *Brady* therefore establishes that severable defects in the statute under

which a defendant is convicted are waived by a guilty plea regardless of whether those defects can be said to be antecedent to the plea.

In addition to its effect as a waiver, Evans' guilty plea also rendered the existence of the preclusion clause constitutionally irrelevant by virtue of the fact that a guilty plea admits all of the elements of the charge. *McCarthy v. United States*, 394 U.S. 459, 466 (1969). This Court, in *Menna v. New York*, 423 U.S. 61 (1975), after reviewing its decisions in *Tollett v. Henderson*, 411 U.S. 258 (1973), *Brady v. United States*, 397 U.S. 742 (1970), and *McMann v. Richardson*, 397 U.S. 759 (1970), explained that:

> in Tollett we emphasized that waiver was not the basic ingredient of this line of cases, 411 U.S. at 266. The point of these cases is that a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it *quite validly* removes the issue of factual guilt from the case. In most cases, factual guilt is a sufficient basis for the State's imposition of punishment. A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established. . . .

Menna v. New York, 423 U.S. at 62-63, n. 2 (emphasis in original). In this Court's words, Evans' guilty plea "quite validly" removes the issue of factual guilt from this case. Since the sole danger of the preclusion clause was that it increased the risk of an erroneous factual determination of guilt in certain circumstances, *Beck v. Alabama*, 447 U.S. at 637-643, the existence of the clause is rendered irrelevant by Evans' guilty plea which removed the issue of factual guilt from this case.

Therefore, whether the effect of a guilty plea be viewed primarily as waiving non-jurisdictional defects or as rendering irrelevant constitutional violations which do not stand in the way of conviction if factual guilt is determined, the conclusion is the same. Evans' conviction is valid not

only because his constitutional rights were not violated, see pp. 22 - 36, *supra*, but also because he pleaded guilty.

IV.

THE COURT BELOW ERRED IN REFUSING TO CERTIFY THE STATE LAW QUESTIONS INVOLVED IN THIS CASE TO THE ALABAMA SUPREME COURT

Depending to some extent on the contentions that Evans makes in this Court, an alternative ground of error in the judgment below is the failure of the court below to certify certain state law questions to the Alabama Supreme Court.

A. This Case Involves Important State Law Questions Which Should Have Been Certified to the Alabama Supreme Court Before the Federal Issues Were Answered

In *Bellotti v. Baird*, 428 U.S. 132, 147 (1976), this Court established the rule that a federal court should certify state law questions to the appropriate state supreme court whenever answers to such questions "might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem." *Accord, e.g., Boehning v. Indiana Employees Ass'n.*, 423 U.S. 6, 7-8 (1975) (abstention correct where state law answers might moot federal issue); *Lake Carriers' Ass'n. v. MacMullen*, 406 U.S. 498, 510-511 (1972) (the "paradigm case" for abstention is where an answer to a state law question might "avoid or modify" the federal issue).

After the decision in *Beck v. Alabama*, 447 U.S. 625 (1980), was issued, Alabama filed a motion requesting the court below to certify seven specified questions of Alabama law to the Alabama Supreme Court. (A. 1, 68-71). Three of those state law questions, raised in the wake of *Beck*,

remain unanswered today.[35] The answer to them, in the words of *Bellotti v. Baird*, *supra*, "might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem." 428 U.S. at 147.

The first of these questions (Question No. 1(c) at A. 68-69) is whether, in view of the evidence at trial, Evans would have been entitled as a matter of Alabama law to have the jury instructed on any lesser included non-capital offense had it not been for the preclusion clause. The question is important because a negative answer will shape the federal issues by establishing, at least in one important respect, the absence of harm and prejudice. See pp. 22-25 and 30-36, *supra*.[36]

The second state law question which should have been certified (Question No. 1(d) at A. 69) concerns whether Evans' guilty plea at arraignment and at trial is valid and effective under Alabama law. Because guilty pleas which have state law validity and effect operate as a matter of federal law to waive and render irrelevant certain constitutional claims, see pp. 40 - 41, *supra*, the answer to this question will certainly shape the federal issues and could materially alter them. The need for certification to answer this particular question of Alabama law is highlighted by the fact that the district court and the court of appeals majority answered it in contrary ways. See pp. 37 - 39, *supra*. Only the Alabama Supreme Court can authoritatively settle which federal court answered this important state question correctly, because only the Alabama

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[35]State law Question Nos. 1(a) and (b) were answered by the Alabama Supreme Court's later decision in *Beck v. State*, 396 So. 2d 645 (1980) (on remand). Question Nos. 1(f) and (g) related to federal issues which it turned out were not addressed by the court below.

[36]The necessity for certifying this particular question depends on whether Evans contends that had the preclusion clause not existed he would have received a lesser offense instruction despite the absence of any evidentiary basis for it. See pp. 22 - 25, *supra*. If Evans concedes that Alabama law does not provide for any lesser included non-capital offense instructions when the evidence is as it was at his trial, then state law Question No. 1(c) is not in dispute and need not be certified.

Supreme Court can speak with final authority on a question of Alabama law. *E.g., Alabama v. King & Boozer*, 314 U.S. 1, 9-10 (1941).[37]

The third question which should have been certified (Question No. 1(e) at A. 69) is whether, in view of the *Beck* decision, Evans is now entitled to have his conviction or sentence reversed as a matter of Alabama law. Petitioners' position is that Evans is not entitled to a new trial as a matter of state law, but to the extent that Evans contends otherwise, that question which has never been answered, might moot the federal issues addressed by the court below.[38]

B. The Rule Adopted By the Court Below Stands the Law of Certification on its Head

The certification motion Petitioners filed in the court below stated that there were no clear, controlling precedents in the decisions of the Alabama Supreme Court on the specified state law questions; that resolution of the questions would avoid in whole or part the federal constitutional issues in this case, or at least substantially modify them; and that answers to the state law questions should come

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[37]Evans' guilty plea is an independently adequate alternative reason why his conviction should not have been set aside. See pp. 36 - 42, *supra*. If this Court agrees with Petitioners' primary contention that Evans' constitutional rights were not violated in any event, see pp. 22 - 36, *supra*, then it does not matter what effect the guilty plea had on his constitutional claims.

[38]The decision in *Ritter v. State*, No. 77-798 (Ala. 1981) (on rehearing), pp. 1a - 9a, *infra*, is based on federal grounds rather than state law grounds. *See, id.*, slip op. at 2 ("We believe this result is compelled by the decision of the Supreme Court of the United States in *Beck* and is consistent with the interpretation of that decision reached by the Court of the Appeals for the Fifth Circuit . . .") (majority opinion), p. 1a, *infra; id.*, slip op. at 10 (". . . it is obvious that this Court, which had affirmed Ritter's conviction [*Ritter v. State*, 375 So. 2d 270 (1979)] now holds Ritter is entitled to a new trial because the United States Supreme Court has mandated it in *Beck*.") (Maddox, J., concurring specially), p. 8a, *infra*.

The Alabama Supreme Court misinterpreted this Court's *Beck* decision in the *Ritter* case. See pp. 14 - 22, *supra*.

from the Alabama Supreme Court because those answers would vitally affect the public policy of Alabama. (A. 69-70) The motion also stated that Alabama law expressly provides for certification of state law questions to the Alabama Supreme Court from federal courts. (A. 70)[39]

Without taking issue with any of the grounds of the certification motion, the court below, with one judge dissenting, 628 F. 2d at 401-402 (Thomas, J., dissenting) (Pet. App. 22a), refused to certify any of the seven specified state law questions to the Alabama Supreme Court. *Id.*, at 401 (majority opinion) (Pet. App. 21a).[40] The majority held, as Evans had urged it to, that since it concluded that Evans was entitled to a new trial as a federal constitutional matter, "certification would be nothing more than an empty academic exercise." *Id.*

Under the rule adopted by the majority below, state law questions are not to be certified if answers to the federal constitutional issues will make the state questions moot. This rule stands the law of abstention-certification on its head. The purpose of abstention-certification is not to avoid or define state law questions by answering federal

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[39]The Alabama Constitution of 1901, Article VI, §140(b)(3), as amended by Amendment No. 328, authorizes the Alabama Supreme Court to answer state law questions certified to it by federal courts, and Alabama Rule of Appellate Procedure 18 (reproduced in Pet. App. 30a-33a) provides the procedure for answering such questions.

The adequacy of Alabama's certification procedure is undisputed, and the Fifth Circuit has twice praised it. *See, Tyler v. Insurance Co. of North America*, 520 F. 2d 341 (5th Cir. 1975) ("the valuable tool provided by the certification provision of the Alabama Constitution"); *Barnes v. Atlantic & Pacific Life Ins. Co.*, 530 F. 2d 98, 99 (5th Cir. 1976) ("certification procedures such as Alabama now has are invaluable tools of cooperative judicial federalism").

[40]Inexplicably, in discussing the certification issue, both the majority and the dissent referred only to specified state law Question No. 1(a), which concerned the severability of the preclusion clause, and ignored the other specified state law questions which Alabama requested the court to certify. 628 F. 2d at 401 (majority opinion) (Pet. App. 17a); *Id.*, at 401-402 (dissenting opinion) (Pet. App. 22a). The decision in *Beck v. State*, 396 So. 2d 645 (Ala. 1980) (on remand), has answered the severability question, but three other specified state law questions which the court below refused to certify remain unanswered. See pp. 43-44, *supra*.

constitutional issues, but just the opposite. The majority below has the rule backwards — the idea is to make federal issues "an empty academic exercise," not the state law questions. By reversing the standard set out by this Court in *Bellotti v. Baird*, 428 U.S. 132 (1976), the majority below has adopted a rule which threatens the utility of abstention-certification and endangers the important policies behind it. This Court has said that abstention-certification "minimize[s] federal-state friction" and "avoids premature and perhaps unnecessary [federal] adjudication," *Kusper v. Pontikes*, 414 U.S. 51, 54-55 (1973), and "in the long run save[s] time, energy, and resources and helps build a cooperative judicial federalism." *Lehman Brothers v. Schein*, 416 U.S. 386, 391 (1974); *accord, Barnes v. Atlantic and Pacific Life Ins. Co.*, 530 F. 2d 98, 99 (5th Cir. 1976) ("certification procedures such as Alabama has now are invaluable tools of cooperative judicial federalism.").

The majority below has taken the cooperation out of "cooperative judicial federalism." By ruling that federal courts should push aside important and possibly dispositive state law issues and grab any opportunity to exercise federal judicial power, it has made the exercise of federal judicial power an end in itself. This Court should not put its imprimatur on that notion.

C. This Court Itself Should Certify the State Law Questions to the Alabama Supreme Court

If this Court concludes that the three state law questions discussed on pp. 43 - 44, *supra*, should be answered by the Alabama Supreme Court before the federal issues are addressed, then instead of remanding the case to the court below with directions for that court to certify the questions, this Court itself should certify them. *See, Elkins v. Moreno*, 435 U.S. 647 (1978); *Massachusetts v. Feeney*, 429 U.S. 66 (1976); *Dresner v. Tallahassee*, 375 U.S. 136 (1963). After receiving the state law answers from the Alabama Supreme Court, this Court can then address the federal issues shaped by those answers.

CONCLUSION

This Court should reverse the judgment of the court of appeals which ordered that the writ of habeas corpus issue. In the alternative, this Court should certify the state law questions discussed on pp. 43 - 44, *supra*, to the Alabama Supreme Court before addressing the federal issues presented in this case.

Respectfully submitted,

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Dated: September 5, 1981

Appendix A

June 12, 1981

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1980-81

77-798 IN THE MATTER OF:

Wayne Eugene Ritter

v.

State of Alabama

After Remand by the United States Supreme Court

On Application for Rehearing

SHORES, JUSTICE.

The application for rehearing is denied. The opinion of the Court dated May 8, 1981 is extended so that the opinion shall read as follows:

Reversed and remanded to the Court of Criminal Appeals with directions to that Court to grant a new trial under the authority of *Beck v. Alabama*, ___ U.S. ___, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980), and *Beck v. State*, 396 So. 2d 645 (Ala. 1980).

We believe this result is compelled by the decision of the Supreme Court of the United States in *Beck* and is consistent with the interpretation of that decision reached by the Court of Appeals for the Fifth Circuit in *Evans v. Britton*, ___ F.2d ___ [March 19, 1981] (1981), which involved Ritter's partner in this crime.

REVERSED AND REMANDED; APPLICATION FOR REHEARING DENIED; OPINION EXTENDED.

Faulkner, Almon, Embry, and Beatty, JJ., concur in decision and in denial of rehearing.

Torbert, C. J., concurs specially in decision, with opinion, and concurs in denial of rehearing.

Jones, J., with whom Maddox and Adams, JJ., concur, concurs in part and dissents in part in decision, with opinion.

Maddox, J., with whom Jones and Adams, JJ., concur, concurs specially in denial of rehearing, with opinion.

TORBERT, CHIEF JUSTICE (Concurring specially).

Although I agree with the result reached by the majority, I do not wish to be understood as being in favor of abolishing or otherwise modifying the traditional rule that a jury instruction on a lesser included offense is appropriate if, and only if, there is evidence of a lesser included offense. *See, Roberts v. Louisiana*, 428 U.S. 325 (1976).

JONES, JUSTICE (Concurring in part and dissenting in part in decision):

The majority of the Court, by directing that the Court of Criminal Appeals reverse the judgment of conviction and sentence and remand the case for a new trial, has mandated that all pre-*Beck* death penalty convictions and sentences be set aside and new trials ordered. As to the judgment of conviction in the instant case, I respectfully dissent.

This death penalty case was remanded by the United States Supreme Court for this Court's reconsideration in light of *Beck v. Alabama*, ___ U. S. ___, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980).

Beck declared unconstitutional the application of the provision of the Alabama Death Penalty Act which precludes the trial court from instructing the jury on lesser included offenses, where, as was the case in *Beck*, the evidence is susceptible of a finding of such an offense. Here, as in *Beck*,

the jury was instructed, pursuant to Alabama Code 1975, § 13-11-2(a), to return either a verdict of guilty with a sentence of death or a verdict of not guilty, precluding the option of finding the defendant guilty of a noncapital offense.

Unlike *Beck*, Ritter's evidence of record fails to support any finding other than a verdict adjudging the Defendant guilty of the capital offense as charged. Unquestionably, had the death penalty statute not included the "preclusion of lesser included offenses" clause (thus conforming the statute to *Beck* on remand [MS. December 19, 1980] ___ So. 2d ___ (Ala. 1980)), Ritter would not have been entitled to a jury instruction on lesser included offenses.

As Ritter's counsel suggests, however, this does not end our inquiry; it merely establishes one of the premises upon which the ultimate dispositive issue must be answered. Another essential premise is the further objective fact that the death penalty statute, under which Ritter was tried, convicted, and sentenced to die, *did* include the "preclusion" clause, the operative effect of which *may* have unduly restricted Ritter's defense with respect to proof of facts and circumstances sufficient to invoke lesser included offenses instructions.

Stated another way, whether the instant record would have entitled Ritter to a lesser included offenses instruction (thus offering the jury a third optional finding) is not the issue; rather, the issue is whether Ritter was unconstitutionally denied the benefit of a trial under a valid death penalty statute permitting evidence which would warrant a jury verdict of guilty of a lesser included offense under appropriate instructions.

The State summarizes its argument as follows:

> "There was absolutely no evidentiary basis at Ritter's trial for any lesser included offense instruction. There was no evidentiary dispute about any element of the capital offense, because Ritter confessed to and admitted every element of the capital offense, and he did so both before and during the

> trial. In addition, Ritter pleaded guilty and his valid guilty plea was accepted by the trial court and entered in the official judgment entry and minutes of the court. The trial court did submit the case to a jury since only a jury can sentence a capital defendant to death, but Ritter's voluntary guilty plea still conclusively establishes his guilt and removes any factual issue from the case."

Ritter's "fundamental fairness" argument is premised on the proposition that the "preclusion" clause operated to bar or to discourage alternative trial strategy, including the offering of evidence which would support a noncapital offense verdict. He argues:

> ". . . The very existence of the provision precluding jury consideration of lesser included offenses would almost invariably affect a capital defendant's strategy, the presentation of evidence and even, as in this case whether actively to contest the charges against him. It is clearly constitutionally impermissible for the state to tell a capital defendant that he may not present evidence of lesser included offenses at trial, and then seek to prevent the defendant from complaining of this unconstitutional prohibition on the grounds that he failed to present such evidence."

Although I disagree with the majority's reversal of Ritter's conviction, I reject the State's contention as an overly simplistic approach. Surely, the presence of the factual issue of lesser included offenses in *Beck* does not limit the application of its holding to only those cases in which the evidence of record supports such a finding. We do not read *Beck* as suggesting that a pre-*Beck* capital defendant was required to so posture his trial strategy as to affirmatively invoke the application of the lesser included offense doctrine, or failing to do so, forfeit the protective cloak of *Beck*.

While the State, in my opinion, has interpreted *Beck* far too narrowly, I believe, as to the judgment of conviction, Ritter's counsel has given it an overly broad interpreta-

tion.[1] Although his argument is persuasive and, undoubtedly, one that ordinarily will prevail, I do not read *Beck*, nor the Supreme Court's remand of the instant case, as mandating reversal in every case in which the defendant has been convicted and sentenced to death under Alabama's death penalty statute.

I would hold that the test for answering the issue here presented for our consideration is whether the evidence of record is susceptible of any reasonable hypothesis giving rise to the application of the lesser included offenses doctrine. Because such hypotheses may arise from either the presence or the lack of evidence adduced at trial, this test cannot be met unless the record of trial affirmatively precludes every reasonable hypothesis other than that of the Defendant's guilt of the capital offense as charged. Any reasonable doubt must be resolved in favor of granting the defendant a new trial.

Therefore, on review of this case, and other pre-*Beck* capital convictions henceforth, I would apply the following objective standard: The conviction is affirmable if, and only if, a composite of the testimony, after indulging every reasonable doubt in favor of the defendant, affirmatively reveals a clear, unequivocal and undisputed chain of events comprising all of the elements of the capital offense to the total exclusion of any reasonable fact or circumstance supportive of a lesser included offense. The inference of such a hypothesis necessarily arises unless the proof of record establishes defendant's guilt of the capital offense fully and undisputably, affirmatively precluding every reasonable inference to the contrary.

Applying this standard of review to the instant case, I am unable to perceive from the proof of record before us any possible hypothesis other than that of the Defendant's guilt of the capital offense as charged in the indictment.

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[1]As shown later in this opinion, I accept defense counsel's contention as to the judgment of sentence.

Aided by the Court of Criminal Appeals' summary of the evidence in *Evans and Ritter v. State*, 361 So. 2d 654, 656-661 (Ala. 1977), and *Ritter v. State*, 375 So. 2d 266, 267 (Ala. 1978), and by this Court's opinion, after return of the case from remand (*Ritter v. State*, 375 So. 2d 270, 273 (Ala. 1979)), I have again made an independent review of the entire record in a painstaking search for the slightest hint that Ritter was restricted, or otherwise influenced, in the conduct of his defense by the omnipresence of the statutory edict that the jury either sentence him to die or set him free. I find none.

Indeed, to the minutest detail, the State's proof of each and every element of the capital offense is verified and amplified by Ritter's own testimony. In addition to pleading guilty of the capital crime as charged, he took the witness stand — against advice of counsel and following the trial court's thorough admonition as to his constitutional rights — and recounted in great detail his and his companion's trail of crime leading up to and including the murder of the pawnshop proprietor during a planned armed robbery of the victim, agreeing in advance to kill the robbery victim if necessary.

The posture of this record affirmatively precludes any reasonable hypotheses other than that of Defendant's guilt of the capital crime as charged in the indictment. Where, as here, the voluntary testimony of a mentally competent defendant affirmatively eliminates any possible inference which would support a finding of guilty of a noncapital lesser included offense, we are constrained to hold that the unconstitutional provision excised by *Beck* visited no impermissible restraint upon the Defendant in the conduct of his defense, including his right to actively contest the charges against him.

To hold otherwise would be tantamount to allowing the Defendant, by way of a new trial, to raise factual issues wholly contrary and in direct contradiction to those established by his own sworn testimony in the original trial. His option to so testify in the original trial cannot be said to have

been impermissibly encouraged by the constitutionally invalid "preclusion" clause.[2]

While I would affirm the judgment of conviction, I, nonetheless, would reverse the judgment of sentence and remand to the Court of Criminal Appeals with instructions to remand this cause to the circuit court for a new trial on the issue of sentence in accordance with this Court's opinion in *Beck* after remand.

My differentiation between the conviction and the sentence is based primarily on the lack of a bifurcation of the pre-*Beck* jury proceedings with respect to the finding of guilty and the fixing of the sentence. While it can be said that the United States Supreme Court's *Beck* mandate does not conclusively require a reversal of Ritter's conviction, I think its mandate is equally clear that the sentencing procedure, which is influenced by factors other than absence or presence of lesser included offenses criteria, is impermissibly tainted, requiring a sentence hearing pursuant to the restructured proceedings established by *Beck* after remand.[3]

Maddox and Adams, JJ., concur

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[2]See *Brady v. United States*, 397 U. S. 742 (1970).

[3]See *Brady v. Maryland*, 373 U. S. 84 (1963); *Parker v. North Carolina*, 397 U. S. 790 (1970).

IN THE MATTER OF: Wayne Eugene Ritter v. State

MADDOX, JUSTICE (Concurring specially in denial of rehearing).

I concur in this Court's action, on application for rehearing, to extend its prior opinion to indicate that its reversal of Ritter's conviction was grounded on this Court's interpretation of what the Supreme Court of the United States mandated in *Beck v. Alabama*, ___ U. S. ___ (1980). This Court considered Ritter's case, in light of *Beck*, only because the case was remanded here at the request of the Attorney General. In brief, the Attorney General sets out the facts:

> On June 20, 1980, the United States Supreme Court issued its decision in *Beck v. Alabama*, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980). On June 23, 1980, the State filed a letter in the United States Supreme Court arguing that Ritter's case was distinguishable from Beck, because there was no evidentiary basis for a lesser included offense in Ritter's case. In view of that difference, the letter requested that the Court remand Ritter's case to the Alabama Supreme Court for reconsideration in light of *Beck*, rather than reversing it on authority of *Beck*.

In view of the above, it is obvious that this Court, which had affirmed Ritter's conviction [*Ritter v. State*, 375 So. 2d 270 (1979)], now holds Ritter is entitled to a new trial because the United States Supreme Court has mandated it in *Beck*. Obviously, I do not believe that Ritter is in the same situation as Beck was; therefore, I joined with Mr. Justice Jones in his dissenting views which he expressed on original delivery.

I still adhere to my original view that under the facts of this case, Ritter is not entitled to a new trial to determine his guilt or innocence of the capital offense. He is only entitled to a sentencing hearing before a jury. That there was absolutely *no evidence* of Ritter's guilt of a lesser included offense is plain, and had an instruction on lesser

included offenses been given in this case, the principle announced in *Roberts v. Louisiana*, 428 U. S. 325 (1976), would be applicable. There, the Supreme Court of the United States held that the Louisiana death penalty scheme which required juries in all first degree murder cases to also be instructed on manslaughter and second degree murder even if there was not a scintilla of evidence to support such a verdict was unconstitutional.

I think a majority of this Court has misread *Beck* to require a new trial in a case like Ritter's where the record of trial affirmatively precludes any possibility that the defendant could have adduced any evidentiary support for a lesser included offense. My difference with the majority in this point aside, however, I agree with the majority's basis for its extension of the opinion on rehearing.

I would also add one additional point on which there is no disagreement among the members of the Court: The order of remand by the Court of Criminal Appeals, as mandated by this Court, is not to be understood as requiring the trial court to instruct the jury on lesser included offenses unless such an offense is supported by the evidence upon retrial of this case.

Jones and Adams, JJ., concur.

Appendix B

May 8, 1981

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1980-81

77-798 Ex parte Wayne Eugene Ritter

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS

(In re: Wayne Eugene Ritter, Alias

v.

State of Alabama)

SHORES, JUSTICE.

Reversed and remanded to the Court of Criminal Appeals with directions to that Court to grant a new trial under the authority of *Beck v. Alabama*, ___ U.S. ___, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980), and *Beck v. State* [MS. December 19, 1980], ___ So. 2d ___ (Ala. 1980).

REVERSED AND REMANDED.

Torbert, C. J., Faulkner, Almon, Embry, and Beatty, JJ., concur.

Maddox, Jones, and Adams, JJ., concur in part and dissent in part.

JONES, JUSTICE (Concurring in part and dissenting in part):

The majority of the Court, by directing that the Court of Criminal Appeals reverse the judgment of conviction and

sentence and remand the case for a new trial, has mandated that all pre-*Beck* death penalty convictions and sentences be set aside and new trials ordered. As to the judgment of conviction in the instant case, I respectfully dissent.

This death penalty case was remanded by the United States Supreme Court for this Court's reconsideration in light of *Beck v. Alabama*, ___ U. S. ___, 100 Sup. Ct. 2382, 65 L. Ed. 2d 392 (1980).

Beck declared unconstitutional the application of the provision of the Alabama Death Penalty Act which precludes the trial court from instructing the jury on lesser included offenses, where, as was the case in *Beck*, the evidence is susceptible of a finding of such an offense. Here, as in *Beck*, the jury was instructed, pursuant to Alabama Code 1975, § 13-11-2(a), to return either a verdict of guilty with a sentence of death or a verdict of not guilty, precluding the option of finding the defendant guilty of a noncapital offense.

Unlike *Beck*, Ritter's evidence of record fails to support any finding other than a verdict adjudging the Defendant guilty of the capital offense as charged. Unquestionably, had the death penalty statute not included the "preclusion of lesser included offenses" clause (thus conforming the statute to *Beck* on remand ([MS. December 19, 1980] ___ So. 2d ___ (Ala. 1980)), Ritter would not have been entitled to a jury instruction on lesser included offenses.

As Ritter's counsel suggests, however, this does not end our inquiry; it merely establishes one of the premises upon which the ultimate dispositive issue must be answered. Another essential premise is the further objective fact that the death penalty statute, under which Ritter was tried, convicted, and sentenced to die, did include the "preclusion" clause, the operative effect of which *may* have unduly restricted Ritter's defense with respect to proof of facts and circumstances sufficient to invoke lesser included offenses instructions.

Stated another way, whether the instant record would have entitled Ritter to a lesser included offenses instruction

(thus offering the jury a third optional finding) is not the issue; rather, the issue is whether Ritter was unconstitutionally denied the benefit of a trial under a valid death penalty statute permitting evidence which would warrant a jury verdict of guilty of a lesser included offense under appropriate instructions.

The State summarizes its argument as follows:

> "There was absolutely no evidentiary basis at Ritter's trial for any lesser included offense instruction. There was no evidentiary dispute about any element of the capital offense, because Ritter confessed to and admitted every element of the capital offense, and he did so both before and during the trial. In addition, Ritter pleaded guilty and his valid guilty plea was accepted by the trial court and entered in the official judgment entry and minutes of the court. The trial court did submit the case to a jury since only a jury can sentence a capital defendant to death, but Ritter's voluntary guilty plea still conclusively establishes his guilt and removes any factual issue from the case."

Ritter's "fundamental fairness" argument is premised on the proposition that the "preclusion" clause operated to bar or to discourage alternative trial strategy, including the offering of evidence which would support a noncapital offense verdict. He argues:

> ". . . The very existence of the provision precluding jury consideration of lesser included offenses would almost invariably affect a capital defendant's strategy, the presentation of evidence and even, as in this case whether actively to contest the charges against him. It is clearly constitutionally impermissible for the state to tell a capital defendant that he may not present evidence of lesser included offenses at trial, and then seek to prevent the defendant from complaining of this unconstitutional prohibition on the grounds that he failed to present such evidence."

Although I disagree with the majority's reversal of Ritter's conviction, I reject the State's contention as an overly simplistic approach. Surely, the presence of the factual issue of lesser included offenses in *Beck* does not limit the application of its holding to only those cases in which the evidence of record supports such a finding. We do not read *Beck* as suggesting that a pre-*Beck* capital defendant was required to so posture his trail strategy as to affirmatively invoke the application of the lesser included offense doctrine, or failing to do so, forfeit the protective cloak of *Beck*.

While the State, in my opinion, has interpreted *Beck* far too narrowly, I believe, as to the judgment of conviction, Ritter's counsel has given it an overly broad interpretation.[1] Although his argument is persuasive and, undoubtedly, one that ordinarily will prevail, I do not read *Beck*, nor the Supreme Court's remand of the instant case, as mandating reversal in every case in which the defendant has been convicted and sentenced to death under Alabama's death penalty statute.

I would hold that the test for answering the issue here presented for our consideration is whether the evidence of record is susceptible of any reasonable hypothesis giving rise to the application of the lesser included offenses doctrine. Because such hypotheses may arise from either the presence or the lack of evidence adduced at trial, this test cannot be met unless the record of trial affirmatively precludes every reasonable hypothesis other than that of the Defendant's guilt of the capital offense as charged. Any reasonable doubt must be resolved in favor of granting the defendant a new trial.

Therefore, on review of this case, and other pre-*Beck* capital convictions henceforth, I would apply the following objective standard: The conviction is affirmable if, and only if, a composite of the testimony, after indulging every reasonable doubt in favor of the defendant, affirmatively

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[1]As shown later in this opinion, I accept defense counsel's contention as to the judgment of sentence.

reveals a clear, unequivocal and undisputed chain of events comprising all of the elements of the capital offense to the total exclusion of any reasonable fact or circumstance supportive of a lesser included offense. The inference of such an hypothesis necessarily arises unless the proof of record establishes defendant's guilt of the capital offense fully and undisputably, affirmatively precluding every reasonable inference to the contrary.

Applying this standard of review to the instant case, I am unable to perceive from the proof of record before us any possible hypothesis other than that of the Defendant's guilt of the capital offense as charged in the indictment.

Aided by the Court of Criminal Appeals' summary of the evidence in *Evans and Ritter v. State*, 361 So. 2d 654, 656-661 (Ala. 1977), and *Ritter v. State*, 375 So. 2d 266, 267 (Ala. 1978), and by this Court's opinion, after return of the case from remand (*Ritter v. State*, 375 So. 2d 270, 273 (Ala. 1979)), I have again made an independent review of the entire record in a painstaking search for the slightest hint that Ritter was restricted, or otherwise influenced, in the conduct of his defense by the omnipresence of the statutory edict that the jury either sentence him to die or set him free. I find none.

Indeed, to the minutest detail, the State's proof of each and every element of the capital offense is verified and amplified by Ritter's own testimony. In addition to pleading guilty of the capital crime as charged, he took the witness stand — against advice of counsel and following the trial court's thorough admonition as to his constitutional rights — and recounted in great detail his and his companion's trail of crime leading up to and including the murder of the pawnshop proprietor during a planned armed robbery of the victim, agreeing in advance to kill the robbery victim if necessary.

The posture of this record affirmatively precludes any reasonable hypotheses other than that of Defendant's guilt of the capital crime as charged in the indictment. Where, as here, the voluntary testimony of a mentally competent

defendant affirmatively eliminates any possible inference which would support a finding of guilty of a noncapital lesser included offense, we are constrained to hold that the unconstitutional provision excised by *Beck* visited no impermissible restraint upon the Defendant in the conduct of his defense, including his right to actively contest the charges against him.

To hold otherwise would be tantamount to allowing the Defendant, by way of a new trial, to raise factual issues wholly contrary and in direct contradition to those established by his own sworn testimony in the original trial. His option to so testify in the original trial cannot be said to have been impermissibly encouraged by the constitutionally invalid "preclusion" clause.[2]

While I would affirm the judgment of conviction, I, nonetheless, would reverse the judgment of sentence and remand to the Court of Criminal Appeals with instructions to remand this cause to the circuit court for a new trial on the issue of sentence in accordance with this Court's opinion in *Beck* after remand.

My differentiation between the conviction and the sentence is based primarily on the lack of a bifurcation of the pre-*Beck* jury proceedings with respect to the finding of guilty and the fixing of the sentence. While it can be said that the United States Supreme Court's *Beck* mandate does not conclusively require a reversal of Ritter's conviction, I think its mandate is equally clear that the sentencing procedure, which is influenced by factors other than absence or presence of lesser included offenses criteria, is impermissibly tainted, requiring a sentence hearing pursuant to the restructured proceedings established by *Beck* after remand.[3]

Maddox and Adams, JJ., concur.

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[2]See *Brady v. United States*, 397 U. S. 742 (1970).

[3]See *Brady v. Maryland*, 373 U. S. 84 (1963); *Parker v. North Carolina*, 397 U. S. 790 (1970).